Supreme Court, U.S.
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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

JOAN WILSON, RONALD WILSON, STEPHEN ROLFE, FREDERICK ROLFE AND ELAINE ROLFE,

Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Judicial Court For The Commonwealth Of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Massachusetts' seawall regulation is connected to a legitimate state interest.

Whether the Massachusetts' seawall regulation meets minimum constitutional standards of scientific methodology and reliability.

Whether Respondent caused the destruction of Petitioners' properties by prohibiting a harmless common land use essential to their protection.

Whether Respondent denied Petitioners' seawall permits as part of a scheme of systematic discrimination against nonresidents of Chatham, Massachusetts.

Whether the record supports the summary dismissal of this case solely on grounds of delay by Petitioners.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Joan Wilson, Ronald Wilson, Stephen Rolfe, Frederick Rolfe, and Elaine Rolfe, and the Respondent, the Commonwealth of Massachusetts.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners Joan Wilson, Ronald Wilson, Stephen Rolfe, Frederick Rolfe and Elaine Rolfe respectfully pray that a writ of certiorari issue to review the August 30, 1996 judgment and opinion of the Appeals Court for the Commonwealth of Massachusetts, and the October 28, 1996 denial of their Petition for Further Appellate Review to the Supreme Judicial Court of the Commonwealth of Massachusetts.

OPINIONS BELOW

Notice of Denial of Motion for Reconsideration dated November 27, 1996. App. 7.

Notice of Denial of Petition for Further Appellate Review by Supreme Judicial Court of Massachusetts dated October 28, 1996. App. 8.

Memorandum and Order Massachusetts' Appeals Court dated August 30, 1996. App. 1.

Memorandum and Order Massachusetts' Superior Court dated December 23, 1994. App. 9.

Department of Environmental Protection Order Staying Hearing dated August 22, 1988. App. 18.

Massachusetts Department of Environmental Protection Superseding Order denying Petitioners' seawall applications dated March 4, 1988. App. 24.

STATEMENT OF JURISDICTION

Petitioners seek relief from the opinion and judgment of the Appeals Court for the Commonwealth of Massachusetts dated August 30, 1996. Petitioners' subsequent requests for Further Appellate Review and Motion for Reconsideration were denied by the Supreme Judicial Court for the Commonwealth of Massachusetts on October 28, 1996 and November 2, 1996, respectively. The Supreme Court has jurisdiction by virtue of 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation".

The Seventh Amendment of the United States Constitution provides that "the right of trial by jury shall be preserved".

The Fourteenth Amendment of the United States Constitution provides that states will give "due process" and "equal protection" to all and will not "make or enforce any law which shall abridge the privileges and immunities of any citizen of the United States".

The Massachusetts Environmental Protection Act, M. G. L., c. 30, sec. 62B. App. 171.

Regulations pursuant to the Massachusetts Environmental Protection Act, 310 C. M. R., sec. 11.00 et seq., App. 169-170.

Regulations pursuant to the Wetlands Protection Act (M.G.L., c. 131, sec. 40), 310 C. M. R., sec. 10.00 et seq., App. 154-164.

STATEMENT OF THE CASE

Petitioners owned summer homes in Chatham, Massachusetts built before 1978.

Respondent bans seawalls on "dune" (sand), App. 154, but allows them to protect houses built on "bank" (mixed sand and clay) before 1978. App. 162.

Even before the regulation was enacted, Respondent's own scientists told it that the distinction between "dune" and "bank" was invalid. App. 29.

Respondent has no data, study, learned paper or theory to support its distinction between a seawall on "dune" and a seawall on "bank." App. 126.

On September 21, 1987, Petitioners notified Respondent that there was flooding on neighboring properties and asked for a meeting to discuss the problem. App. 32.

This was the first serious flooding in Chatham in several decades. App. 36.

The meeting took place on October 13, 1987 and focused on keeping flooding from reaching Petitioners' properties. App. 36.

By November 19, 1987, flooding was widespread and a state of emergency was declared. App. 43.

By early December, seventy-three feet of shore in front of Petitioners' houses had disappeared. App. 48.

On December 10, 1987, Respondent denied Petitioners' request for an emergency seawall, App. 48, and told them it would take months to process the application for a permanent one. App. 49.

Respondent urged the use of sandbags instead. These were tried and failed immediately. App. 48.

The Trial Court allowed Petitioners to build a small seawall providing they posted bond for its removal if it caused damage to the environment or neighboring properties. Both the seawall and the bond were in place by December 27, 1987.

Respondent promised to expedite Petitioners' permit applications for a larger seawall. These were filed on January 15, 1988 and allowed by the Town on February 2, 1988.

On February 17, 1988, Respondent informed Petitioners that the next step in the administrative process was a Superseding Order and this could not be issued unless they filed an Environmental Notification Form (ENF) or filing of the ENF was waived. App. 148.

On February 24, 1988, Petitioners' representative went to Respondent's offices with ENFs and a waiver application. He was told the ENF would be waived. App. 63.

The Superseding Order was issued on March 4, 1988, App. 24, and formal notice of the waiver was issued on March 8, 1988. App. 64.

The Superseding Order denied Petitioner's permit applications because the seawalls would be on "dune". App. 24.

Petitioners appealed and were given a hearing date of August 22, 1988.

It cost $3,000 a month to replace sand lost from behind the small seawall. App. 61.

Petitioners were ready for the August 22, 1988 hearing. The Respondent was not.

The Administrative Law Judge (ALJ) suspended the hearing and ordered Petitioners to file an ENF. App. 22.

The ENF was sent to Respondent on September 1, 1988. App. 66.

Respondent never set another hearing date.

On September 27, 1988, Respondent ordered an Environmental Impact Report (EIR) for the 2.5 mile stretch of Chatham coast that included Petitioners' 150 feet of frontage.

The EIR was to detail the environmental impact of every seawall in place or proposed, including accelerated erosion, App. 70, possible alternatives and what would happen if proposed seawalls were not built (the "no build alternative"). App. 68.

The estimated cost of the EIR was over $100,000 and it would require at least a year to complete. App. 60.

In early September 1988, the ALJ and Respondent inspected Petitioners' properties.

Petitioners filed motions for a speedy hearing on September 12, 1988 and October 7, 1988 pointing out that

a prompt hearing was essential to save the houses. App. 71-76.

On October 22, 1988, after a northeast storm, the houses were torn down by order of the local building inspector.

Between 1989 and 1990, thirty seawalls were built along the coast for half a mile on either side of Petitioners' properties. Every builder was supposed to file an ENF within ten days of starting construction and begin work on an EIR within sixty days thereafter. No ENFs or EIRs were filed for these projects. App. 77.

Respondent did nothing to force compliance.

All of these seawalls were built on "dune". App. 99, App. 113 and App. 137.

In June of 1992, another homeowner who had been denied an appeal hearing, advanced the $30,000 necessary to start work on the EIR. App. 107.

In July of 1992, Respondent forbade study of the environmental impact, accelerated erosion and no build alternatives for the thirty seawalls it had permitted in the area. App. 84. Petitioners protested immediately. App. 106.

On February 28, 1993, during the comment period for the EIR, Petitioners again protested, pointing out that the refusal to study seawalls in place was illegal and part of a pattern of discrimination against nonresidents of Chatham. App. 86.

Notice of approval of the EIR was given on August 24, 1993 and became final on September 30, 1993. App. 165.

Petitioners filed a Motion to Amend their Complaint in this case to include counts for Bad Science, Discrimination and Bad Faith on September 21, 1993 exactly within the regulatory time frame for legal challenges. App. 169.

The Amended Complaint pointed out that forty-three applications for seawall permits were made in the area covered by the EIR.

Twenty-two of the applications were made by Chatham residents, twenty-one by nonresidents.

Twenty-one resident applications (95%) and nine nonresident applications (43%) were approved. App. 100 and App. 135.

All of the approved seawalls were on "dune". App. 99, App. 113 and App. 137.

All nonresident applications were to protect houses. The only resident denied a permit wanted a seawall to protect his tennis court. App. 102.

Other residents were allowed seawalls to protect golf greens, tennis courts and parking lots. A nonresident was ordered to extend his seawall to protect his resident neighbor. App. 115.

Petitioners' nonresident neighbors were ordered to build a seawall for the Town at a cost of $15,000 each. This condition was waived for resident neighbors. App. 112.

Six of the nonresident houses denied permits were lost, App. 102, and the rest heavily flooded. App. 135. None of the residents allowed permits suffered any damage. App. 102.

The Respondent used its monthly newsletter to publish cartoons and quotations from the Bible ridiculing those who lost their homes. App. 95.

Petitioners' data had been gathered by detailed study of all permit applications after January 1, 1987 and the entire study was properly before the Trial Court. App. 102.

The Amended Complaint included a detailed description of the lack of regulatory quantification and science as to seawalls, erosion and the distinction between "dune" and "bank". App. 128 and App. 126.

The motion to Amend was summarily dismissed without a hearing or findings on January 12, 1994. App. 96.

On December 23, 1994, the Superior Court granted Summary Judgment for Respondent, finding that Petitioners had unreasonably delayed the course of administrative proceedings. App. 9.

This finding was upheld by the Appeals Court on August 30, 1996, App. 1. The Supreme Judicial Court declined to review that finding on November 27, 1996. App. 7.

REASONS FOR GRANTING THE WRIT

1. Respondent's regulation is not connected to any legitimate state interest.

2. Respondent's regulation has no scientific basis.

3. Respondent destroyed petitioners' properties by prohibiting a harmless common land use essential to their protection.

4. Respondent systematically denied seawalls to nonresidents of Chatham while routinely allowing them to residents.

5. Lower Court summary findings improperly deprived Petitioners of their right to a trial by jury.

1. RESPONDENT'S REGULATION IS NOT CONNECTED TO ANY LEGITIMATE STATE INTEREST.

Land lost to erosion is lost forever. Its clay dissolves and its sand is carried out to sea by floodwaters. Beaches are mounds of eroded sand in transit to deep water. App. 130.

A seawall stops erosion by stopping floodwaters before they reach land. Respondent claims this "causes" erosion because it denies sand to beaches. App. 131.

Testing this claim is a matter of comparing erosion rates in an area before and after a seawall is built.

The Massachusetts Environmental Protection Act requires comparison of what happens if a proposed project is not built (the "no build alternative") to what happens if it is. App. 171.

Almost thirty percent of the Massachusetts coast is protected by seawalls. App 134. More than forty new seawalls have been built in Chatham since 1987. App. 114. Respondent has twenty years of experience with seawall regulation and has evaluated the impact of every

seawall proposal made in that time. Yet Respondent has no data, learned paper or study to support its claim that seawalls cause erosion.

The only detailed study of seawalls thus far (1992) concluded they do not cause erosion. App. 140.

In 1988, the Respondent ordered an Environmental Impact Report (EIR) to evaluate accelerated erosion caused by seawalls in place or proposed along a 2.5 mile stretch of coast in Chatham. App. 70. Respondent never enforced this order, App. 77, and eventually modified it by forbidding study of accelerated erosion and the no build alternative for the thirty seawalls it had permitted in the area. App. 84.

Respondent does not know the number of seawalls it has permitted on Cape Cod or the number it might permit in the future. App. 110.

Respondent has not established any roughly proportional connection between seawalls and increased erosion. Its seawall regulation is unconnected to any legitimate state interest. *Dolan v. City of Tigard*, No. 93-518, ___U.S. ___, ___S.Ct. ___, 1994 Westlaw 876693 (1994).

2. RESPONDENT'S REGULATION HAS NO SCIENTIFIC BASIS.

Respondent allows seawalls to be built on coastal "bank" to protect structures built before 1978, 310 Code of Massachusetts Regulations Section 10.00 et seq. App. 162.

Respondent does not allow seawalls on coastal "dune". App. 154.

Coastal bank is a mix of sand and clay. Coastal dune is the sand from coastal bank after floodwaters have dissolved the clay. App. 124.

Respondent has no data, study or learned paper that suggests any difference between a seawall on "dune" and a seawall on "bank". App. 126.

Even before the regulation was enacted, Respondent's lead scientists told it that the distinction was invalid. App. 29.

All of the thirty seawalls permitted in the Chatham EIR area are on "dune". App. 99, App. 113 and App. 137.

Respondent has no quantification to support its distinction between "dune" and "bank". The distinction is not connected to any legitimate state purpose. *Dolan v. City of Tigard*, No. 93-518, ___U.S. ___, ___S.Ct. ___, 1994 Westlaw 876693 (1994) and is without scientific reasoning or methodology. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* ___U.S. ___, 113 S.Ct. 2786 (1993).

Daubert is a common sense approach to the widespread problem of scientific fraud that should be applied to all evidentiary hearings. Its application to this case would have saved Petitioners' houses and a decade of litigation.

3. RESPONDENT DESTROYED PETITONERS' PROPERTIES BY PROHIBITING A HARMLESS COMMON LAND USE ESSENTIAL TO THEIR PROTECTION.

Almost thirty percent of the Massachusetts coast is protected by seawalls. App. 134.

Petitioners' neighbors were allowed to build thirty seawalls covering the coast for half a mile on either side of Petitioners' properties. App. 99-102.

All of these seawalls were on "dune". App. 99, App. 113 and App. 137.

Respondent denied seawalls to Petitioners because they would be on "dune". App. 24.

Petitioners' only remedy was an administrative hearing at which they had to show that no "significant" quantity of dune sand would be held onshore by the proposed seawall.

"Significant" in this context meant "any natural ridge, hill or mound of dune sand". App. 131, App. 132, and App. 155.

Respondent had no basis for its distinction between "dune" and "bank", permitted numerous seawalls on dune, forbade objective study of seawall impacts on neighboring areas and had no quantified or scientific basis for its assertion that the impacts might be adverse.

Respondent has not studied the impacts of seawalls it has licensed on Cape Cod and when given the opportunity to study the impacts of those it permitted in Chatham, refused to do so. App. 84.

Respondent refused to determine if Petitioners' seawalls would have been a common nuisance and has no regulatory mechanism for making such a determination.

Respondent took Petitioners' properties. *Lucas v. South Carolina Coastal Council*, ___U.S. ___, 112 S.Ct. 2886 (1992); *Lopes v. City of Peabody*, 417 Mass. 299, 629 N.E.2d 1312 (1994).

On October 14, 1994, Petitioners moved for Summary Judgment based on Respondent's failure to comply with *Lucas*, App. 142. This motion was dismissed by the Trial Court on the theory that Petitioners' delay caused the loss of their properties. App. 15.

Respondent denied Petitioners' permit application seven months before the houses were lost. The denial made no mention of delay, could not have been issued if any paperwork was missing and was complete on its face. The permits were denied because the proposed seawalls were to be built on "dune". App. 24.

When constitutional and scientific issues were raised during the administrative appeal of the denial, Respondent said they were inappropriate. App. 120.

Petitioners informed Respondent of flooding near their properties on September 21, 1987, met with Respondent to discuss solutions three weeks later and had a small seawall in place two months after that.

Petitioners had posted bond for removal of the seawall if it proved harmful to the environment or neighboring properties. If it needed more time, Respondent could have allowed the seawall to be built pending the outcome of administrative proceedings. App. 45.

Petitioners did everything they could to protect their property and their rights. Respondent did everything it could to deny the rights and destroy the property.

This matter deserved the objective judicial scrutiny mandated by *Dolan*, *Daubert* and *Lucas*.

4. RESPONDENT SYSTEMATICALLY DENIED SEAWALLS TO NONRESIDENTS OF CHATHAM WHILE ROUTINELY ALLOWING THEM TO RESIDENTS.

More than forty seawalls were built in Chatham between 1987 and 1992. Thirty of these were in the area described in Respondents' EIR Order of September 27, 1988.

Out of forty-three permit applications in the EIR area, twenty-two were by Chatham residents and twenty-one by nonresidents. App. 100 and App. 102.

Twenty-one out of twenty-two resident applications were allowed. The only denial was for a seawall to protect a tennis court.

Nine out of twenty-one nonresident permits were allowed. App. 100 and App. 102.

All twenty-one nonresident permit applications were to protect houses. Six of those houses, including Petitioners', were lost to flooding. App. 102. All of the rest have been heavily flooded. App. 135.

No resident property with a seawall has been damaged. App. 102.

Nonresident seawalls were allowed only where they protected the flanks of resident properties. App. 113.

Residents were allowed seawalls to protect a golf green (outside the EIR area), a tennis court and two empty lots. In one case (outside the EIR area), a nonresident was allowed a seawall on the condition he extend it so as to protect his resident neighbor. App. 115.

Petitioners' nonresident neighbors were ordered to build a seawall for the Town of Chatham at a cost of $15,000 each. This order was later waived for residents. App. 112-113.

The Respondent used official publications to focus hatred and scorn on those who lost their houses to flooding. App. 95.

These facts were brought to the attention of the Respondent, App. 106 and App. 86.

On September 21, 1993, Petitioners moved to amend their Complaint to include counts for Discrimination, Bad Faith and Bad Science. This motion was brought exactly within the regulatory time frame for legal challenges. App. 169.

The Amended Complaint was dismissed on January 12, 1994 without hearing or findings. App. 96.

Classifications which interfere with a fundamental right are subject to strict scrutiny under the Constitution. *Collins v. Schweitzer, Inc.*, 774 F. Supp. 1253 (D. Idaho 1991); *Holland v. Breen*, 623 F. Supp. 284 (D. Mass 1985); *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

Petitioners have been denied equal protection and due process. *Lopes v. City of Peabody*, 417 Mass. 299, 629 N.E.2d 1312 (1994).

5. LOWER COURT SUMMARY FINDINGS IMPROPERLY DEPRIVED PETITIONERS OF THEIR RIGHT TO A JURY TRIAL.

In ten years of litigation, Petitioners have never received an evidentiary hearing on any issue. All their claims have been summarily dismissed by finding that Petitioners' delay caused the loss of their properties.

a. Delay Before September 1987

There was no flooding anywhere in Chatham before September 21, 1987. App. 36.

Respondent will not accept permit applications where there is no flooding. App. 126.

Petitioners had no reason to know they would be flooded and no means of protecting themselves if they had known.

b. Delay After September 21, 1987

On September 21, 1987, Petitioners requested a meeting to discuss flooding on adjacent Town property. App. 32.

The meeting was held on October 13, 1987. The flood had not yet reached Petitioners' properties. App. 36.

On November 18, 1987, an emergency was declared in Petitioners' area. App. 43.

On December 10, 1987, with seventy-three feet of shore lost in two months, Respondent urged the use of sandbags and told Petitioners they could not have a seawall without going through "months" of permitting. App. 49.

The sandbags were tried and failed immediately. App. 49.

Petitioners then obtained a Court Order allowing them a small seawall providing they posted bond for its removal if it damaged neighboring properties or the environment. The seawall and the bond were in place by December 27, 1987.

Petitioners made formal applications for seawall permits on January 15, 1988. These were denied on March 4, 1988. App. 24.

Respondent did not allege any delay by Petitioners when it denied their applications. The applications were denied because the proposed seawalls would be built on "dune".

Petitioners' only remedy was an administrative appeal. When Petitioners raised constitutional and scientific issues in that proceeding, they were told these were improper. App. 120.

Petitioners had done everything possible to protect their properties and constitutional rights by March 4, 1988, seven months before their houses were destroyed. The houses could have been preserved indefinitely by allowing Petitioners' application, App. 45, subject to the

outcome of administrative proceedings and using the bond money to remove the seawalls if necessary.

c. Delay in Filing the Environmental Notification Form (ENF).

On February 17, 1988, the Respondent informed Petitioners that they must file an ENF or apply for a waiver of the filing in order to proceed to the next step in the administrative process, a Superseding Order. App. 148.

Petitioners' construction supervisor appeared on February 24, 1988 at the Respondent's office with the ENFs and a waiver application. He was told the ENFs would be waived App. 63.

The Superseding Order was issued on March 4, 1988. App. 24.

On March 8, 1988, Respondent formally waived filing of an ENF until ten days after seawall construction began. App. 64.

Respondent's EIR specialist agrees that Petitioners were part of this waiver. App. 152.

On August 22, 1988, the Administrative Law Judge (ALJ) ordered Petitioners to file an ENF and await completion of whatever process it triggered before they could have a hearing. App. 21.

The ENF was sent to the Respondent on September 1, 1988. App. 66.

The houses were still standing and could have been preserved indefinitely at a cost of $3,000 a month. App. 61.

On September 27, 1988, Respondent ordered an Environmental Impact Report (EIR) for every seawall in place or proposed for a 2.5 mile stretch of coast that included Petitioners' 150 feet of frontage. App. 68.

Estimated cost of the Environmental Impact Report was $100,000 and estimated time to complete it was at least a year. App. 60.

The EIR was beyond the means of Petitioners.

The EIR was never completed, App. 80, and no seawall builder ever filed an ENF or EIR. App. 77.

Petitioners had a small seawall in place and had posted bond for its removal if it damaged neighboring properties or the environment. If it needed more time, Respondent could have authorized Petitioners to complete the seawall pending completion of the administrative process. App. 45.

Alleged filing delays were irrelevant in this case. Respondent had no interest in the ENF or EIR and had issued its Superseding Order after waiving filing of both documents.

d. Factual Errors in Lower Court Opinions

The Trial Court found no evidence that Petitioners tried to file the ENF or received a waiver of the filing on or before March 4, 1988. It also found no evidence that Petitioners were included in the ENF waiver of March 8, 1988. App. 15 (footnote).

The testimony of Petitioners' construction supervisor as to filing the ENF and receiving the waiver was properly before the Court. App. 175.

Also properly before the Court, was the affidavit of Respondent's employee that the waiver applied to Petitioners. App. 174. (See App 62 and App. 152 for the deposition and affidavit themselves.)

Also properly before the Court, was Respondent's recitation that it could not issue a Superseding Order without an ENF or waiver. App. 148.

The Trial Court's assertion that Petitioners' properties were exposed to "severe erosion" on January 3, 1987, App. 10, is inconsistent with the absence of any flooding before September, 1987 and Respondent's characterization of flooding on October 13, 1987 as "localized". App. 36.

The Appeals Court found that the Petitioners had to file the ENF by May 8, 1988 at the latest. App. 4. There is no evidence to support this finding. ENFs must be filed before a Superseding Order can be issued unless a waiver is granted postponing filing. App. 148. In that case, ENFs must be filed ten days after construction begins. App. 66.

e. Respondent's Delay Clear and Inexcusable.

Petitioners did everything they could to avoid delay, including motions on September 12, 1988 and October 7, 1988 for a speedy hearing on the grounds that the houses would soon be lost. App. 71-76.

The Respondent and ALJ inspected the properties in early September 1988.

Had a prompt hearing been given, Petitioners could have continued to pay the $3,000 a month needed to protect the houses. App. 61.

Respondent could have allowed Petitioners to build their seawalls subject to the outcome of the administrative process. App. 45. (Petitioners had already posted bond with the Trial Court for removal of the seawalls if they damaged the environment or neighboring properties.)

In fact, the Respondent is not interested in any objective study of possible links between seawalls and erosion and did everything it could to prevent evaluation of Petitioners' proposed seawalls.

The Lower Courts made no "ad hoc factual inquiries" balancing Respondent's actions and their impact on Petitioners. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978).

Instead, Lower Courts focused on Petitioners' conduct and made findings of fact unsupported by the record. The right to have a jury decide disputed facts is guaranteed by the Seventh Amendment.

There are few cases of this size that can be simplified to one issue and dismissed without trial. Factual errors in Lower Court Opinions reveal an incomplete analysis of the record and the record itself shows that Petitioners did not delay.

Respondent, on the other hand, had as much time as it needed to objectively study Petitioners' seawall proposal and chose not to do so.

Who delayed in this case is in dispute. It is a jury issue. Petitioners were denied their day in Court.

CONCLUSION

This case should be remanded for further proceedings consistent with Dolan, Daubert and Lucas.

If Respondent is unable to establish a quantifiable, scientific foundation for its regulation, it will still have the chance to show that Petitioners' seawalls would in fact have been a common nuisance or that Petitioners were responsible for the loss of their properties.

The Respondent loses nothing on remand.

Without remand, Petitioners will have lost their properties and their day in Court.

Respectfully submitted,

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

95-P-565

JOAN WILSON & others[1]

vs.

COMMONWEALTH.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

After years of litigation, see *Wilson v. Commonwealth*, 413 Mass. 352 (1992), a Superior Court judge denied the plaintiffs' motions to amend their complaint and for summary judgment[2] and allowed the defendant's motion for summary judgment. The plaintiffs appealed.

The facts of this matter are set out in the opinions of the Supreme Judicial Court, *Wilson v. Commonwealth*, *supra*, and the Appeals Court, *Wilson v. Commonwealth*, 31 Mass. App. Ct. 757 (1992). In summary, the plaintiffs brought this action in 1989 claiming that the Commonwealth's failure to permit them to build protective barriers resulted in the loss of their oceanfront properties. *Wilson*, 413 Mass. at 353. On their present appeal, the plaintiffs contend that they are entitled to a trial on their claim that the Department of Environmental Protection

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[1] The plaintiffs are Joan Wilson, Ronald Wilson, Stephen Rolfe, Frederick Rolfe, and Elaine Rolfe. The parties do not distinguish between the Wilsons and the Rolfes, so we treat them as identically situated.

[2] We agree with the motion judge that the nuisance issue raised by the plaintiffs' motion for summary judgment was not before him.

(DEP)[3] caused the destruction of their properties through unreasonable administrative delay, and that their motion to amend their complaint to allege discrimination against them should have been allowed.

1. Unreasonable administrative delay. The plaintiffs must show that: (1) there was delay; (2) the delay was due to unreasonable conduct by the DEP; and (3) timely action by the DEP would have resulted in saving the plaintiffs' properties from destruction. *Wilson,* 413 Mass. at 355. In determining whether the DEP's conduct caused unreasonable delay, we note the Supreme Judicial Court's rejection "as a basis for a taking claim the destruction of property by natural forces while an administrative procedure is following its normal, reasonable course. . . . A requirement that a person follow administrative procedures for obtaining a permit is not a taking of property." *Wilson,* 413 Mass. at 356-357. Consequently, and as the trial court reasoned, we need not address discretionary decisions made by the DEP as "there is no delay where the DEP properly exercises its discretion, even though its decision results in a lengthier administrative process."[4] Rather, we focus on the deadlines set by the DEP's regulations.

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[3] DEP was formerly known as the Department of Environmental Quality Engineering.

[4] An example of such a discretionary decision is the DEP's decision to grant or deny the plaintiffs' request for emergency authorization of their project. 301 Code Mass. Regs. § 11.11 (1987) reads, in relevant part: "In the rare situation where immediate action by an agency or person is essential . . . a project *may* commence without an ENF or EIR. . . . " (emphasis added).

The plaintiffs do not specify any facts indicating that the DEP missed any deadlines set by its regulations. For example, the DEP's regulations permit DEP to issue a superseding order to overturn a local conservation commission's decision if it is issued within seventy days. 310 Code Mass. Regs. § 10.05(7) (f) (1987). Here, the conservation commission authorized the plaintiffs' proposed revetment construction on February 2, and the DEP issued its superseding order on March 4, 1988, well within the seventy-day limitation.

Moreover, even if there had been unreasonable delay, it does not appear that quicker action would have saved the plaintiffs' properties. Additionally, the plaintiffs' own delays, on two occasions, permitted the destruction of their homes.

First, the plaintiffs delayed action for one year after the breach in the Nauset Beach barrier.[5] Second, even though the DEP informed the plaintiffs on February 17, 1988, that they were required to submit an Environmental Notification Form (ENF) before proceedings could continue, the plaintiffs did not file the ENF until September 1, 1988. The plaintiffs' own expert appraiser testified that their properties were a total economic loss as of July 21, 1988, when they were condemned by the Town of Chatham. Thus, the properties were lost before the plaintiffs triggered proceedings by the filing of the ENF.

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[5] As the trial judge observed, "[a]lthough the breach took place in January 1987, the Department had no reason or obligation to act until a full year later, when plaintiffs filed for a permit in January 1988, and the Commission approved."

Even if we agree with the plaintiffs that their properties were destroyed as of the October 1988 flooding, as opposed to the July condemnation, their claim still fails. The judge noted that by September 1, 1988, the date on which the plaintiffs filed the ENF, "[t]here was no possibility that the Department could proceed through the required review and comment periods . . . in time to have avoided the October 1988 flooding of the plaintiffs' homes." 301 Code Mass. Regs. § 11.00 (1987); 310 Code Mass. Regs. § 10.00 (1987). The plaintiffs contend that they believed that a letter granting other homeowners emergency authorization and, hence, an extension on the filing of the ENF, also granted them such an extension.[6] However, even if the plaintiffs had been granted emergency status, their ENF was still filed approximately four months past the extended due date. If they had been granted emergency status and, hence, an ENF filing extension, their ENF would have been due on May 8, 1988. But they did not file their ENF until September 1, 1988. Therefore, the plaintiffs' contention that they relied on the letter granting emergency status to others cannot excuse their late filing of the ENF.

In sum, there was no act or omission on the part of the DEP which caused the destruction of the plaintiffs'

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[6] The record is unclear as to why the plaintiffs were not granted emergency proceedings. The DEP's decision to deny the plaintiffs' request for emergency authorization, however, was discretionary. We accept the DEP's discretionary decisions when it comes to following their own administrative procedures. Consequently, we do not consider any takings claim based on this decision. See note 2, *supra*.

homes. The defendant's motion for summary judgment was properly allowed.

2. Motion to amend the complaint. In 1993, more than four years after the commencement of this action, the plaintiffs moved to amend their complaint to add the Town of Chatham as a defendant and to allege unlawful discrimination against them as nonresident property owners. The judge denied the motion, and the plaintiffs urge here that it should have been allowed. Except as to the possible administrative delay-regulatory taking claim, the action had been dismissed, so the plaintiffs correctly sought leave to amend, rather than purporting to do so as of right. Mass.R.Civ.P. 15(a), 365 Mass. 761 (1974). Such a motion is addressed to the discretion of the trial judge. Here, no reason was given by the judge, but " . . . a judge who . . . denies a motion to amend due to undue delay or undue prejudice is acting within his discretion." See *Murphy v. I.S.K. Con. of New England, Inc.*, 409 Mass. 842, 864 (1991). See also *Leonard v. Brimfield*, 423 Mass. 152 (1996).

The plaintiffs offer two justifications for the timing of their motion to amend. First, they explain that the claim of discrimination was not included in the original complaint because it is based on "facts not understood as rising to discrimination when the original complaint was brought, or occurring later." Specifically, they say that the alleged discrimination did not become apparent until November 21, 1991, when the DEP waived permit requirements for resident property owners, but maintained such requirements for nonresidents. However, that explanation does not excuse the additional two years from November of 1991 until October of 1993, when they moved to amend.

Second, the plaintiffs assert that the DEP withheld testimony by its own expert who found the DEP's distinction between dune sand and bank sand to be an irrational classification.[7] The DEP had relied, in part, on this distinction to deny a permit to the plaintiffs since their stone revetment would have been built on dune sand. The plaintiffs claim that they did not learn of the expert testimony until June, 1994, and that it was not until then that they realized that the DEP used this distinction to disguise its preferential treatment of resident property owners. However, since the plaintiffs filed their motion in 1993, this explanation for the timing of their motion is unpersuasive. We conclude that the judge's denial of the motion to amend was not an abuse of his discretion.

There being no error, the orders of the Superior Court judge, denying the plaintiffs' motions to amend their complaint and for summary judgment and allowing the defendant's motion for summary judgment, are affirmed.

So ordered.

By the Court (Brown,
Porada, & Flannery, JJ.),
/s/ Nancy Turck Foley
Clerk

Entered: August 30, 1996.

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[7] According to the DEP's wetland regulations, revetments are prohibited on coastal dune but may be erected on coastal bank in some situations. 310 Code Mass. Regs. §§ 10.28(4) (1987) & 10.30(3) (1987).

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

TO: Nicholas B. Soutter, Esquire
1 Washington Street,
Suite 208
Wellesley, MA 02108

RE: No. FAR-08748

JOAN WILSON & others
vs.
COMMONWEALTH

NOTICE OF DOCKET ENTRY

Please take note that on November 27, 1996, the following entry was made on the docket of the above-referenced case:

DENIAL of petition for reconsideration of denial of FAR application.

Jean M. Kennett, Clerk

Dated: November 27, 1996

To: Nicholas B. Soutter, Esquire
Stephen Dick, A.A.G.

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

TO: Nicholas B. Soutter, Esquire
1 Washington Street,
Suite 208
Wellesley, MA 02108

RE: Docket No. FAR-08748

JOAN WILSON & others
vs.
COMMONWEALTH

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on October 28, 1996, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: October 28, 1996

To: Nicholas B. Soutter, Esquire
Stephen Dick, A.A.G.

Commonwealth of Massachusetts

BARNSTABLE, ss. SUPERIOR COURT

No.
CIVIL ACTION
NO. 89-881

JOAN WILSON, and others[1]

vs.

COMMONWEALTH OF MASSACHUSETTS

MEMORANDUM OF DECISION AND ORDER ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs brought this action on July 31, 1989, claiming that the Commonwealth's failure to allow them to build stone revetments to protect their oceanfront property and homes resulted in the loss of that property. This court allowed the Commonwealth's motion to dismiss under Mass. R. Civ. P. 12(c). The Appeals Court affirmed as to all counts of the complaint except those alleging a regulatory taking without compensation. The Supreme Judicial Court held that, as a matter of law, the circumstances disclosed in the pleadings could not constitute a regulatory taking, except that the facts alleged in the complaint sufficiently supported a claim for a taking by unreasonable agency delay, remanding that specific issue to this court for further proceedings. This matter is now before the court on the parties' cross motions for summary judgment. For reasons set forth below, the

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[1] Ronald Wilson, Stephen Rolfe, Frederick Rolfe, and Elaine Rolfe.

Commonwealth's motion is granted, and the plaintiff's motion is denied.

BACKGROUND

The facts in this case are set out more completely in the recitation of facts provided by the Supreme Judicial Court, *Wilson v. Commonwealth*, 413 Mass. 352 (1992), and the Appeals Court, *Wilson v. Commonwealth*, 31 Mass. App. Ct. 757 (1992).

On January 3, 1988, approximately one year after a storm exposed plaintiffs' oceanfront property to severe erosion, plaintiffs and other landowners petitioned the Chatham Conservation Commission ("the Commission") for permission to build stone revetments to protect their properties. The Commission acquiesced on February 2, but on February 17, the Department of Environmental Quality Engineering ("the Department") (now the Department of Environmental Protection), appealed the Commission's decision and informed plaintiffs that they were required to file an Environmental Notification Form ("ENF") pursuant to the Massachusetts Environmental Protection Act ("MEPA"), G.L. c. 30 § 62, et seq.; 301 Code Mass. Regs. § 11.00, et seq. On March 4, the Department reversed the Commission with respect to plaintiffs, on the grounds that plaintiffs' properties were designated "coastal dune" upon which seawalls could not be built. However, by letter dated March 8, the Department gave other landowners emergency authorization to begin building stone revetments, without first filing an ENF. On March 11, plaintiff sought an adjudicatory hearing, and on May 6, were informed that a pre-hearing conference

was scheduled for June 14. The pre-hearing conference was held as scheduled, and the parties agreed to submit pre-filing testimony in preparation for the hearing. On August 8, the Hearing Officer decided to suspend the adjudicatory process until after the MEPA process was completed. On September 14, plaintiffs filed their ENF and requested that the adjudicatory hearing process move forward pending completion of the MEPA process, due to the danger created by the continuing erosion of their properties. The plaintiffs repeated this request on October 7, but the Department took no action on these motions. On October 22, plaintiffs' homes were demolished by order of the town of Chatham. On January 17, plaintiffs voluntarily dismissed their case from the administrative proceedings.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community National Bank v. Dawes*, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, "and [further] that the moving party is entitled to judgment as a matter of law." *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). "If the moving party establishes the absence of triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat [the] motion." *Id.*, at 17. "[T]he opposing party cannot rest on his or her pleadings

and mere assertions of disputed facts to defeat the motion for summary judgment." *LaLonde v. Eissner,* 405 Mass. 207, 209 (1989).

The sole issue before this court is whether the Department is guilty of improper delay with respect to plaintiffs' application for a permit to build a stone revetment. The burden of proof is on the plaintiffs to show, "among other things, that the department ultimately would have granted permission for the revetment, that the revetment would have been built, that the delay was due to unreasonable agency action, and that a favorable department decision within a reasonable time would have resulted in saving the plaintiff's properties from total destruction." *Wilson,* 413 Mass. at 355. In this case, plaintiffs have failed to provide any facts to show that the Department delayed, reasonably or unreasonably, the administrative process, or that quicker action by the Department would have saved plaintiffs' properties.

In determining what constitutes unreasonable delay, this court is guided by the SJC's rejection "as a basis for a taking claim the destruction of property by natural forces while an administrative procedure is following its normal, reasonable course. . . . A requirement that a person follow administrative procedures for obtaining a permit is not a taking of property." *Id.* at 357. Thus, there is no delay where the Department properly exercises its discretion, even though its decision results in a lengthier administrative process. Consequently, this court need not consider any takings claim based on the Department's decisions to: (1) classify plaintiffs land as "coastal dune" rather than "coastal beach"; (2) appeal and overturn the Commission's approval of plaintiffs' request; (3) require

plaintiffs to comply with MEPA and file an ENF; (4) deny plaintiffs' request for emergency authorization of their project; and (5) suspend the adjudicatory process pending completion of the MEPA process.

Instead, this court turns its focus to the timing of the department's actions, particularly with respect to deadlines set by its regulations. Under the Department's regulations, any person who wishes to alter an area subject to protection under the Wetlands Protection Act, G.L. c. 131, § 40, must first submit a Notice of Intent to the local conservation commission. 301 CMR § 10.05(4)(a). The Commission must hold a public hearing to consider the proposal within 21 days of its receipt, § 10.05(5), and issue an Order of Condition within 21 days of the hearing. § 10.05(6). The Department may, of its own initiative, act on the Order of Conditions. If the Department issues a Superseding Order to overturn the Commission's decision, it must do so within 70 days. § 10.05(7)(f). Within 10 days after issuance of the Superseding Order, the person who entered the proposal may request an adjudicatory hearing, § 10.05(7)(j), by filing a Notice of Claim for an Adjudicatory Proceeding. § 1.01(6)(a). At the discretion of the Department, the parties may be required to attend a pre-hearing conference. § 1.01(10)(a). Also, the parties may be required to submit pre-filed direct testimony prior to the hearing. § 1.01(8). The regulations contain no express time limits for the setting of a pre-trial conference or an adjudicatory hearing.

Any project which requires a permit from the Department or any other state agency is subject to the review and approval under MEPA. § 11.00, et seq. The process is initiated by the project proponent, who must file an ENF

with the Secretary of Environmental Affairs. A review period follows, during which the Secretary determines whether an Environmental Impact Report (EIR) is necessary. If an EIR is required, it is prepared by the project proponent, and subjected to various levels of review, which takes a minimum of 111 days. See § 11.01(5) (MEPA Process Flow Chart). Except where the project is allowed to proceed under the emergency authorization procedures, § 11.11, the Department cannot issue the desired permit until the MEPA process is complete and the project has been approved.

Plaintiffs have not specified, and this court has not found, any express deadline which the Department failed to meet. With respect to Department actions which are not governed by express deadlines, i.e. scheduling of a pre-hearing conference after a hearing is requested, it is possible that the Department may wait so long that it becomes guilty of unreasonable delay. In this case, however, plaintiffs have come forward with no facts to indicate that the scheduling of the pre-hearing conference was in any way unreasonable.[2]

Moreover, plaintiffs' own delays obviates any liability for delays allegedly caused by the Department. Although the breach took place in January 1987, the Department had no reason or obligation to act until a full

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[2] Plaintiff's own permitting expert, Robert Weaver, stated, "Once I know I have to appeal to an adjudicatory process, I know in my own mind, and I advise my clients that I don't even expect to even get a pre-hearing for at least a year or two." Thus, from plaintiffs' own evidence, it appears that the Department acted on plaintiffs' request for a hearing in a reasonable manner.

year later, when plaintiffs filed for a permit in January 1988 and the Commission approved. Within weeks of reversing the Commission, the Department informed plaintiffs that they would have to comply with the MEPA process and submit an ENF. Plaintiffs did not do so until September 1988.[3] By that time, there was no possibility that the Department could proceed through the required review and comment periods in the MEPA process in time to have avoided the October 1988 flooding of plaintiffs' homes. Thus, even if the Department had rushed through the adjudication process, i.e. by granting an immediate adjudicatory hearing and overturning its previous denial of plaintiffs' application, the need to complete the MEPA

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[3] Plaintiffs claim that on March 8, 1988, Robert Weaver ("Weaver"), plaintiffs' permitting expert, filed or tried to file an ENF but was told that the March 8 letter granting certain landowners emergency authorization ("the March 8 letter") made it unnecessary. This suggests to this court that the reason for plaintiffs' delay in filing the ENF was due to misinformation from the Department. Upon closer examination of the record, this court cannot find any evidence to support this assertion. The evidence provided by plaintiffs in support of this claim, a March 10, 1988 letter from Weaver to the U.S. Army Corps of Engineers (not to the Department), requests an emergency waiver but does not mention an ENF. The record contains no affidavit or other testimony from Weaver that he prepared an ENF, filed or attempted to file an ENF, or discussed the need to submit an ENF with the Department. Indeed, other letters in the record submitted by plaintiffs indicate that no ENF had been completed as of March 8, and that plaintiffs knew that the emergency authorization, and hence, the ENF waiver, did not apply to them. Even at the summary judgment stage, this court cannot give weight to bare allegations by plaintiffs, unsupported and contradicted by their own evidence.

process would still have prevented plaintiffs from saving their homes.

Plaintiffs have failed to produce any evidence that the Department unreasonably delayed the administrative process. Moreover, plaintiffs have failed to show how a speedier response from the Department would have prevented the destruction of plaintiffs' homes. Accordingly, the Commonwealth's motion for summary judgment of plaintiffs' remaining takings claim will be allowed.

With respect to the plaintiffs' motion for summary judgment, the issue of whether the plaintiffs' proposed seawalls would constitute a nuisance is not any issue which has been remanded to this court.[4] Even if it were, there is sufficient evidence to raise an issue of fact as to whether the construction of seawalls would impair the storm damage prevention and flood control functions of plaintiffs' beaches. Accordingly, plaintiff's motion for summary judgment must be denied.

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[4] In *Lucas v. South Carolina*, 112 S.Ct. 2886 (1992), the Supreme Court held that in order to apply the rule that harmful uses of property may be proscribed by government regulations without compensation, the government had to come forward with evidence sufficient to support a claim for public nuisance. *Lucas* is inapplicable to the issue of unreasonable agency delay, the sole issue before this court. As the SJC stated, *Lucas* "did not involve any administrative proceedings concerning the use of the properties, the total loss of the value of the property due to natural forces while such proceedings were pending, or any alleged dilatory agency conduct. . . . Moreover, here, unlike the *Lucas* case, the governmental regulation did not by itself make the landowner's property valueless." *Wilson*, 413 Mass. at 357-358.

ORDER

It is therefore ORDERED that the Commonwealth's motion for summary judgment is ALLOWED. and plaintiffs, motion for summary judgment is DENIED.

/s/ Gerald F. O'Neill, Jr.
Gerald F. O'Neill, Jr.
Justice of the Superior Court

DATED: December 23, 1994

A true copy, Attest:

/s/ Phyllis A. Day Clerk

The Commonwealth of Massachusetts

Executive Office of Environmental Affairs

Department of Environmental Quality Engineering

One Winter Street, Boston 02108

[SEAL]
DANIEL S. GREENBAUM
Commissioner

August 22, 1988

In the Matter of:	Docket Nos. 88-94 THRU 88-97
ROBERTS ET.AL.	File Nos. 10-653 THRU 10-656
	CHATHAM

DECISION ON DEPARTMENT'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE, PARTIAL DISPOSITION OF DISCOVERY MOTIONS

AND

ORDER TO APPLICANT CONCERNING MEPA COMPLIANCE

At a prehearing conference on June 14, 1988, the parties agreed to a schedule for the submission of pre-filed direct testimony which required the filing of written testimony by the Petitioners, Pam Butler Roberts, *et. al.*, on August 1, 1988, and the submission of written testimony by the Department three weeks thereafter. The Petitioners failed to submit testimony and first made a written request for extension of time on August 5, 1988.

On August 8, 1988, the Department, prior to receiving the Petitioners' request for extension of time, filed a Motion to Dismiss for Failure to Prosecute. On August 11, 1988, Petitioners counsel, Nicholas B. Soutter, filed an affidavit in opposition to the Department's Motion, which stated, among other things, that he had spoken with the Department's counsel prior to August 1, 1988 concerning his need for an extension of time until August 18, 1988, for the reason that he had not yet received funds from his clients; and also that he was not aware that he was required to file a formal motion. Mr. Soutter represented in his affidavit that he has now received the necessary funds and is intends to file his testimony on August 18, 1988. (The testimony has since been filed.)

Although Petitioners failed to comply with 310 CMR 1.01 (4)(d), requiring requests for extensions of time to be made by motion before the expiration of the original time period, the facts presented in the affidavit of Petitioners' counsel do not reflect an intent by Petitioners not to prosecute, insofar as prosecution of this matter requires the Petitioners to go forward with the submission of prefiled direct testimony. Accordingly, I am granting the Petitioners' implied request to submit prefiled direct testimony on August 18, 1988.

The Department has also asserted that Petitioners' failure to prosecute is evidenced by the fact that they have not proceeded with voluntary discovery and have failed to file an Environmental Notification Form (ENF) as required by the Massachusetts Environmental Policy Act (MEPA). With regard to discovery, the statement of

Petitioners' counsel that he is pursuing voluntary discovery, combined with the fact that no delay in the proceedings is being sought while discovery is in progress, causes me to conclude that Petitioners' conduct does not reflect a failure to prosecute.

With regard to the Petitioners' Interrogatories and Request for Documents, both filed on or about May 4, 1888 [sic], and the Department's Motion to Strike Interrogatories and Request for Stay of Time, both filed on May 16, 1988, the Motion to Strike is granted insofar as it objects to interrogatories being propounded to state agencies other than the Department. Such other agencies are not parties to the pending proceeding and therefore may not be required to answer interrogatories pursuant to 310 CMR 1.01(8) (c).

The Motion to Strike is also granted with respect to the propounding of the May 4, 1988 interrogatories to the Chatham Conservation Commission, because the record does not disclose that these interrogatories were served upon the Conservation Commission or even that they were intended, in the form propounded, to be addressed to the Commission. Since the Chatham Conservation Commission is not a subdivision or agent of the Department, interrogatories served upon the Department and inquiring about practices of the Department cannot be treated as directed to the Conservation Commission.

Disposition of all other matters concerning discovery will be deferred until the parties have completed voluntary discovery.

As for compliance with MEPA, the Department has asserted, and the Petitioners have not disputed, that the

proposed work requires the filing of an ENF. While I do not find that the Petitioners' failure to proceed with the MEPA process warrants a dismissal at this time, I am in agreement with the Department's assertion that prompt compliance with MEPA is essential if this matter is to proceed to a hearing.

Although the MEPA statute, G.L. c.30, §§61-62H, and the regulations thereunder, 301 CMR 11.00, do not expressly prohibit the Department from conducting adjudicatory proceedings prior to the completion of the MEPA process, they do bar the Department, from taking formal action to issue a permit, after an adjudicatory hearing or otherwise, until MEPA requirements have been met.

Since the filing of an ENF is the first step in an administrative process which may result in the project proponent's preparation of an Environmental Impact Report (EIR), it will generally be the better practice to suspend or stay the presentation of evidence in an adjudicatory proceeding (particularly evidence from parties other than the project proponent) until the MEPA process has been completed. Accordingly, the schedule for submission of further prefiled testimony in this proceeding is suspended pending completion of the MEPA process.

Given that the EIR is characterized at 301 CMR 11.01(4) as a "planning tool to enable environmental damages and benefits to be fully disclosed and considered by public agencies and project proponents before they make their decisions," an adjudicatory hearing schedule which defers the submission of testimony until an EIR is completed (or a determination is made that an EIR is not required) promotes the goal of assuring that information

generated through the MEPA process will receive meaningful consideration in the hearing process. See, *In the Matter of NNB Associates, et.al.*, Docket No. 85-91 [Hearing Officer's Decision on Motion of Citizen Group Respondents to Stay Adjudicatory Hearing, March 12, 1987] at 4-8; *In the Matter of Candlewood trust*, Docket No. 86-102 [Report of Conference and Order for Further Proceedings, March 9, 1988], at 3.

Since I have determined that the adjudicatory hearing cannot go forward until the Petitioners in this proceeding file ENF's, the Petitioners are ordered to submit to me, within three weeks of the date of this Order, either copies of their completed ENF's or a showing of sufficient reasons for their failure to file ENF's, including a statement of the date on which they intend to submit these documents. If the Petitioners' response fails to show an intent to actively prosecute this case, the Petitioners will be subject to dismissal pursuant to 310 CMR 1.01(7) (d) (2).

/s/ Patricia Lewis
Patricia Lewis
Hearing Officer

SERVICE LIST

PERSON SERVED	STATUS IN PROCEEDING
Nicholas M. Soutter, Esq. 1 Washington Street Wellesley, MA 02181	Attorney for Applicants
Matthew Watsky, Esq. Deputy General Counsel DEQE One Winter Street Boston, MA 02108	Attorney for Department Staff
James Mahala DEQE – SERO Lakeville Hospital Lakeville, MA	Department Staff

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
Southeast Region
Lakeville, Hospital, Lakeville, Massachusetts 02347
947-1231, Ext. 680-684

[SEAL]
Gilbert T. Joly
Regional Director

March 4, 1988

E.I.T., Inc.
Box 631
73 Cranberry Highway
Sagamore, Massachusetts
02561

RE: CHATHAM –
Wetlands File No. SE
10-656, Superseding
Order of Conditions
Pleasant Bay/Rolfe

ATTENTION: Robert E. Weaver

Gentlemen:

Following an in-depth review of the above-referenced file and in accordance with Massachusetts General Laws, Chapter 131, Section 40, the Department of Environmental Quality Engineering has issued the enclosed Superseding Order of Conditions. This Order denies the project as proposed. The Department has determined that the project area is significant to the statutory interests of flood control and storm damage prevention.

Several on-site inspections by Department personnel have determined that the Rolfe (File No. SE 10-656), Galanti (File No. SE [illegible]) and Wilson/Malagodi (File No. SE 10-654) properties comprise a Coastal Dune (310 CMR 10.28(2)) and Coastal Beach (310 CMR 10.27(2))

resource areas as defined in the Wetlands Protection Act Regulations. Proposed activity upon the project site includes the construction of a sloping stone revetment. The Department has determined that the proposed project would affect the ability of waves to remove sand from the dune and interfere with the landward or lateral movement of the dune. The Department has also determined that the proposed project would have an adverse impact on the coastal beach immediately seaward of the proposed structure by reflecting a certain amount of wave energy downward thereby causing scour at the toe of the proposed structure resulting in a change in form of the coastal beach. Therefore, the Department has found that the proposed project does not meet the performance standard for Coastal Dunes at 310 CMR 10.28(3)(a) and (d) and for Coastal Beaches at 310 CMR 10.27(3) and, thus, should not be allowed.

The proponents of the proposed project have argued that the remaining dune on the Rolfe, Galanti and Wilson/Malagodi properties is not significant and does not serve the interests of the Wetlands Protection Act. The Department, however, has determined that the remaining dune on the aforementioned properties continues to function in storm damage prevention and flood control by supplying sand to coastal beaches and downdrift coastal resource areas. Furthermore, the Department is of the opinion that the proponents have not adequately met their burden of proof as required at 310 CMR 10.03(1)(a) to overcome the presumed significance of these resource areas.

Please be advised that the Department has no objection to the implementation of a beach/dune nourishment

program. Furthermore, the Department would not object, in this instance, to the placement of sand-filled dura-bags or sand-filled tubes (i.e., longuard tubes) along this eroding section of dunes. If one of the above options is pursued then the Department would suggest that the proponents request that the work be allowed per 310 CMR 10.06 (Emergency Certification). Said request could be made directly to the Department's Southeast Regional Office.

In the opinion of the Department, the reasons given here are sufficient to justify this Superseding Order of Conditions. However, the Department reserves the right should there be further proceedings in this matter, to raise additional issues and present further evidence as may be appropriate.

Very truly yours,

/s/ Robert P. Fagan
Robert P. Fagan
Deputy Regional
Environmental Engineer

F/JM/re

cc: Conservation Commission

Nicholas B. Soutter
Attorney at Law
One Washington Street
Wellesley, MA 02181

Ted Rolfe
22 Wesson Terrace
Northboro, MA 01532

Waterways Regulation Program
DEQE
One Winter Street
Boston, MA 02108
ATTN: Charles J. Natale, Jr.

Division of Water Pollution Control
DEQE
One Winter Street
Boston, MA 02108
ATTN: Judy Perry

Gary Clayton, Division Director
Division of Wetlands-Waterways Regulation
DEQE
One Winter Street
Boston, MA 02108

EOEA, MEPA Unit
100 Cambridge Street
Boston, MA 02202

cc: Madelyn Morris
Assistant Attorney General
Environmental Protection Division
Department of the Attorney General
One Ashburton Place
Boston, MA 02108-1698

Mass. Coastal Zone Management
100 Cambridge Street
Boston, MA 02202
ATTN: Jeff Benoit

USACOE
N.E. Division – Regulatory Branch
424 Trapelo Road
Waltham, MA 02254

Teresa McCormick
Tobey & Riley
P.O. Box 707
Chatham, MA 02633

[p. 1]

VOL. I
PP. 1 - 52

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss.

Superior Court
C.A. No. 89-881

****

JOAN WILSON, ET AL,

Plaintiffs

vs.

COMMONWEALTH OF MASSACHUSETTS, ET AL

Defendants

****

DEPOSITION OF GRAHAM SHERWOOD GIESE, taken on behalf of the Plaintiff, pursuant to the Massachusetts Rules of Civil Procedure, before Maryellen Coughlin, CSR/RPR, a Notary Public within and for the Commonwealth of Massachusetts, at the Law Offices of Nicholas B. Soutter, One Washington Street, Wellesley, Massachusetts, on Wednesday, July 12, 1994, commencing at 2:10 p.m.

HAROLD A. GABRIEL, CSR
15 Van Wart Path
Newton Centre, Mass. 02159
(617) 969-4791
FAX (617) 964-1321

* * *

[p. 33] Q With reference, Doctor, to the distinction drawn between dune and bank for purposes of seawall

permitting, were you part of the group that recommended the regulations as they exist today, or not, if you remember?

A Yes, yes, I certainly was.

Q Can you tell us, sir, what the purpose was of that distinction, if you remember?

A Well, the group that actually did, the scientific group that did the recommendations did not recommend that they be, that there be a distinction in terms of seawall placement, that group recommended that there not be any seawalls allowed along any part of the shore which is providing sediment to the beach system through erosion, and that was that. The whole idea of their [sic] being some distinction between homes being on the coast which had been in place prior to 1978 AS opposed to homes built after 1978, '78 being the date of the publication of those regulations, was not part of the scientific group's recommendations. That distinction was made, as I understand it, by the, by the Commonwealth of Massachusetts in an effort to recognize the difficulties that homeowners who [p. 34] had homes on coastal banks prior to 1978 would experience as a result of the regulations.

MR. SOUTTER: I have no further questions, Doctor, thank you very much.

MR. STEILING: Can we just take a break?

(A break was taken at this time.)

Cross-examination By Mr. Steiling:

Q Doctor Giese, I just have a very few questions. I think I will be done very quickly. I just want to ask you

about mainly one of the issues you were asked about by Mr. Soutter, and that is you were asked about an April 1987 address that you gave at Chatham High School, do you recall being asked about that?

A I recall the question.

Q Do you recall what you talked about in general?

A Well, yes, the reason for the meeting was to convey to the town what was known and what wasn't known and what we could say and what we couldn't say to provide guidance for the town's people concerning the situation which everyone

* * *

Exhibit 2

JOHN R. DEVEREAUX
Attorney-At-Law
286 Beacon Street
Boston, Massachusetts 02116
(617) 267-0377

September 21, 1987

The Honorable Board of Selectmen
Town of Chatham
549 Main Street
Chatham, Massachusetts 02633

RE: Flooding At Town Parking Lot, Andrew Harding's Lane

Dear Selectmen:

I represent Elaine and Frederick Rolfe, the owners of the property at 53 Andrew Harding's Lane. I am writing to inform you of the Rolfe's concern over the danger posed to their property by flooding of the Andrew Harding's Lane parking lot, and to request a meeting on this matter as soon as possible.

As I am sure you know, the sea currently washes over the beach at the parking lot at high tides and partially floods the parking lot. Earlier this month, water from the parking lot washed onto the Rolfe's property. This happened in the absence of a storm or unusual wave action. It is quite clear that high seas combined with high tides will result in significant flooding of the Rolfe's property from the parking lot with the potential for damage to the foundations of their house. Of course the likelihood of high seas becomes much greater with the approach of winter, thus the urgency of this request.

It is also likely that the risk of damage will not be limited to the Rolfe's property. Since the grade of the parking lot is higher than that of Andrew Harding's Lane, the properties west of the parking lot are also vulnerable to flooding in a severe storm, and certainly under conditions similar to those which caused the break in North Beach last January.

The Rolfes are presently preparing to take measures to improve the protection afforded by the dune in the front of their house, but will still be vulnerable on the parking lot side due to the absence of the dune there. It is the Rolfe's request that you implement Dr. Giese's recommendation, made earlier this summer, to restore the dune in the parking lot. This would provide protection to their property as well as the properties west of the parking lot. It is the Rolfe's position that the town is legally obliged to restore this dune, or provide suitable alternative protection, since it was the town which removed the dune to create the parking lot and town landing.

If it is not possible to restore the dune prior to this winter, the Rolfe's request that the town take appropriate interim measures to protect their property from flooding in the parking lot.

Since any action by the town is going to be evaluated on the basis of the costs involved, I believe that it would be unrealistic if consideration is not given to the potential liability of the town for damages resulting from failure to take appropriate action. The potential property damage caused by flooding in a severe storm would appear to far exceed the costs of taking the recommended corrective measures.

It is requested that a meeting on this matter be scheduled as soon as possible and that you inform me of the time and place. Thank you.

Very truly yours,

/s/ John R. Devereaux
John R. Devereaux

JRD/ds
#1(JRD16)
cc: Elaine and Frederick Rolfe

(SEAL) TOWN OF CHATHAM
Office of the Selectmen (LOGO)

October 1, 1987

John R. Devereaux
286 Beacon Street
Boston, MA 02116

Dear Mr. Devereaux:

The Board of Selectmen share your concern regarding the erosion taking place at Andrew Hardings Lane. On Friday, September 25th, a number of Town officials visited the site and met with area residents. The proper solutions to the problem are still under discussion. In order to enable the Board to better evaluate the situation, the Selectmen have called for a special meeting to be held on Tuesday, October 13th at 4:00PM in Town Hall. Representatives of various state agencies, Dr. Graham Giese, who is performing an intensive investigation of the situation, as well as interested Town Boards and Departments will be attending.

I would hope that you or your representative would also attend this meeting.

Very truly yours,

/s/ James A. Lindstrom
James A. Lindstrom
Executive Secretary

JAL:bb

Tuesday, October 13, 1987

The meeting was called to order at 4:00PM by Chairman Pennypacker with all members present. Town Counsel Bruce Gilmore was also present.

Andrew Hardings Lane/Holway Street/Water Street

Dr. Graham Geise of Woods Hole Oceanographic Institute and Jeff Benoit, of C.Z.M. along with residents of the subject area were present. Mr. Pennypacker introduced Dr. Geise and said he would tell the meeting what has happened. Dr. Geise said he has been looking at the change in the shoreline since March. Since this summer he has found the area of erosion localized; Holway Street has cut back a great deal, the scarp has moved 21' since August. In May he toured the Town parking lots with the Conservation Commission. He found that Andrew Hardings parking lot is the most exposed. He recommended the outer part of the parking lot not be used. He said a dune once existing at Andrew Hardings Lane, right now the dune is not there and waves are cutting into the parking lot. Mr. Pennypacker said some of the residents present are concerned about their properties and the Town is not in a position to offer remedies for private property. Dr. Geise said the inner shoreline of Chatham is quite complex and the formation of a dune at Andrew Hardings is a natural process and had the dune not been removed, the waves could cut into the dune. He said the minimum thing to do would be to remove the pavement and let the dune build, but that it was too late for that, and suggested a synthetic dune. Mr. Young asked how long a new dune would last at the present rate of erosion,

and Mr. Pennypacker asked what would happen if the Town did nothing. Dr. Geise said individual decisions have to be made for individual problems, and there are going to be a variation of responses to each area. He said if the Town did nothing the sand would be deposited on the pavement and it would cut away and be deposited on the beach. He suggested removing the pavement. Mr. Pennypacker asked about the risk of enhancing the problem elsewhere. Dr. Geise said it would help minimize the storm wave action. Mr. Young asked if Mr. Benoit and Mr. Gilmore would comment. Mr. Benoit suggested removing the pavement and/or dune reconstruction. Mr. Gilmore asked Dr. Geise if he had any guess of the cost to add sediment, remove the pavement and replace the dune, and the cubic yards needed. Dr. Geise said he could develope [sic] volume numbers, but the cost would have to come from someone else. Mr. Pennypacker opened the meeting to public questions. The public did not identify themselves, but some questions asked included: would the entire parking lot have to be removed? Dr. Geise said the minimum would be to remove pavement 50' back; what would be the impact on property north of the parking lot? Dr. Geise said it would help, as the source of sand would then be continuous; what would be the impact on the marina? Dr. Geise said sand is coming from the north, a dune won't make significant changes in the deposition rate at the marina; will a synthetic dune be as effective as an existing dune? Dr. Geise said it would approximate a natural dune. He also said the drywall and pavement on the beach at Holway Street should be removed, and debris kept off the beach. Mr. Howes said if the Town does something and property is damaged it

could be construed that the Town contributed to the damage, he suggested identifying the properties that would be affected and get the owner's consent before taking any action. Dr. Geise felt that property would be affected in a positive way. Another question from the public was: are you prepared to make any recommendations as to what we can do to preserve our property? Dr. Geise said they could temporarily use sand bags, it might slow down the erosion. Mr. Clint Hammond suggested using Jersey barriers backed up with several loads of sand. Mrs. Charlotte Ventola asked what the effect was of people walking on the dunes. Dr. Geise said it was harmful to the vegetation. Mrs. Ventola suggested forming a sub-committee to address the issue. Mr. Pennypacker said there could be an ad hoc committee with representatives from the Board of Selectmen and Conservation Commission, and suggested anyone with expertise volunteer to serve. Someone asked about the effect on the fish pier area. Dr. Geise said the severe erosion stops 200' from Holway Street, and the next place that's cutting is just south of the fish pier. Mr. Costello asked if any new breaks are coming through on North Beach. Dr. Geise said there are overwashes but he doesn't expect to see new inlets. Mr. Pennypacker asked when the Board of Selectmen should do something. Dr. Geise said as soon as possible, the pavement should be pulled up and material applied. Mr. Richard Miller mentioned the loose debris on the beach and felt it was normal maintenance duty for the Town to clear it. Mr. Tim Wood reporter for the Cape Cod Chronicle asked if the old landings at Andrew Hardings should be taken up also. Dr. Geise said they should. Mr. Young said even soft engineering such as sand bags

require a permit. Mr. Pennypacker suggested the next agenda include further discussion on this subject.

Mr. Gilmore said an attorney representing some landowners in the area called him today. He stated that he has no reason to recommend the Board of Selectmen do anything. It is the duty of the Town to maintain parking lots, and they could close the entire parking lot and post it as hazardous. he said the present conditions is "God-made", and to remove the parking lot would change the course of the water. He said the Board should do nothing but close he [sic] parking lot at this time. Mr. Howes moved that Andrew Harding's Lane be closed to all except property owners from Main Street east, with the exception of emergency vehicles and be so posted. Mr. Young seconded and the Board voted unanimously in favor.

The meeting adjourned at 5:40PM

A True Copy, ATTEST,

Selectman, Clerk

/s/ Barbara Bascetta
My Commission Expires
January 21, 1994

Selectmen's Meeting
Thursday, October 15, 1987

My Commission Expires January 21, 1994

The meeting was called to order by Chairman Pennypacker at 4:00Pm with all members present.

Andrew Hardings Land/Holway Street/Water Street

Mr. Young said there are 20 to 30 property owners involved, and it would be a sizeable task to contact all of them to absolve the Town from any liability. Mr. Gilbert Borthwick Highway Surveyor said he would not want to see the parking lot torn up at this time. Mr. Costello said any money the Town invests in it could be washed away in a matter of days. Police Chief Barry Eldredge said before sand is hauled from Hardings Beach that area should be looked at, as it could upset the ecology at Hardings Beach to do so. He said it's soft sand and won't hold through a storm, and the best time to do it would be April, and plant dune grass to hold it. Mr. Pennypacker suggested the Board consult an engineer. Chief Eldredge said it should be a coastal engineer. Mr. Franz said at one time the Wordell's asked for the Town's help with their cottages on Nantucket Sound and they were told the Town could not help them. He said there was also Mr. Gilmore's advice regarding Town liability, and any decision made here will set a precedent.

Mr. Lindstrom said he asked Mr. Gilmore what the Town could do to minimize its liability, and Mr. Gilmore said to get releases from the property owners. A comment was made from the audience that when the Town put in the parking lot at Andrew Hardings Lane it took away the existing sand dune, and the Town should put back the way it was. Mr. Pennypacker moved that the Board select an engineer for advice and go to the Finance Committee for a transfer for an unforeseen emergency. Mr. Young seconded and the Board voted unanimously in favor.

Mr. Howes said in the meantime if property owners want to do something on their own they should. Mrs. Donna Molander asked where the sand would come from for sand bags. Mr. Young explained that the Conservation Commission gives permission and tells where to get the sand from. Mr. Pennypacker suggested Mrs. Molander and Mr. John Whelan act as liaisons between the property owners and the Selectmen. Mr. Franz said it would be wise to ask Mr. Gilmore to write a release letter. Mr. Richard Miller said the loose asphalt should be picked up, as Dr. Geise stated that it was keeping water from being absorbed by percolation into the natural sand. He said he disagreed with the Board's decision not to remove the loose asphalt, and there would be no liability incurred by the Town doing its normal maintenance. Mr. Young said the Board has had it spelled out very clearly for them, that if the Town did anything liability would enter into it. Chief Eldredge said the Town property between Water St. and Mistover La. will be posted. Mr. Young moved that the stairs at Water Street be closed, Mr. Costello seconded. The Board voted unanimoulsy [sic] in favor.

Andrew Hardings Lane/Holwasy [sic] Street

Mr. Lindstrom handed the Board information regarding names of several engineering firms to contact regarding the erosion. A memo from the Conservation Commission was also read. Both documents are on file in the Selectmen's office. Mr. Pennypacker said the Board voted to engage the services of an engineer for opinion and guidance on what course to take. Mr. Lindstrom said there

were some questions at the last meeting regarding liability if the Highway Department removed debris from the beach. Mr. Pennypacker said the Conservation Commission should be notified. Mrs. Alice Hiscock said more should be removed than just what's broken. Mr. Pennypacker said that was the reason the Town was engaging an engineer. Mr. Lindstrom said we should have releases from property owners to protect the Town. Mr. Pennypacker said he would contact the engineering firms. Mrs. Hiscock said the Board should write to the Conservation Commission for emergency permission to clear the loose debris from the beach at Andrew Hardings Lane and Holway Street.

A True Copy, ATTEST,

Selectman, Clerk.

Excerpt from Oct. 22, 1987 Selectmen's meeting, A True Copy. Attest, Barbara Bascetta

My Commission Expires January 21, 1994

(Seal)

Town of Chatham

Conservation Commission

November 19, 1987

Brett Burdick
The BSC Group
Rte. 28
Mashpee, Mass. 02649

Project no. 4-4004.00
Emergency request certification for Andrew Hardings Lane area.

Dear Mr. Burdick;

This letter confirms that the Chatham Conservation Commission certifies that an emergency condition exists along the Chatham Harbor shoreline from the low dunes to the south of the Town parking lot at Andrew Harding's Lane northward to include the Place property off Watch Hill Way.

The Board of Health and Selectmen of the Town of Chatham have separately voiced their concerns and pointed out the public health and safety consideration caused by the rapid erosion.

The Commission approves the proposed emergency action outlined in your letter of November 13, with attachments, which proposal was discussed in detail at our meeting on the evening of November 18, 1987.

We require that a qualified representative of B.S.C. provide continuous on-site supervision. It is further understood that any on-site material used will essentially come from the trenching or from the area between the trench and the toe of the banking. Off-site material used will be of similar or somewhat larger grain size – the presence of

some pebbly material in the conglomerate would not be objectional.

Please inform the Commission in advance of the start date which we hope will be within seven days of the date of this letter.

Sincerely,

/s/ Illegible Chairman
/s/ Illegible
/s/ Illegible
/s/ Illegible

cc: Selectmen
DEQE
John Whelan
DBW/j

10.06: Emergencies

(1) Any person requesting permission to do any emergency project shall specify why the project is necessary for the protection of the health or safety of the citizens of the Commonwealth and what agency of the Commonwealth or subdivision thereof is to perform the project or has ordered the project to be performed. If the project is certified to be an emergency by the conservation commission or the Commissioner, the certification shall include a description of the work which is to be allowed and shall not include work beyond that necessary to abate the emergency. A site inspection shall be made prior to certification.

(2) An emergency certification shall be issued only for the protection of public health or safety.

(3) The time limitation for performance of emergency work shall not exceed 30 days, or 60 days for Immediate Response Actions approved by the Bureau of Waste Site Cleanup (BWSC) of the Department of Environmental Protection in accordance with the provisions of 310 CMR 40.0410, unless written approval of the Commissioners is obtained.

(4) A copy of an emergency certification shall be sent to the Department when it is issued by a conservation commission, and to the conservation commission when it is issued by the Department.

(5) The Department may, on its own motion or at the request of any person, review: an emergency certification issued by a conservation commission and any work permitted thereunder: a denial by a conservation commission of

a request for emergency certification: or the failure by a conservation commission to act within 24 hours of a request for emergency certification. Such review shall not operate to stay the work permitted by the emergency certification unless the Department specifically so orders. The Department's review shall be conducted within seven days of: issuance by a conservation commission of the emergency certification: denial by a conservation commission of the emergency certification: or failure by a conservation commission to act within 24 hours of a request for emergency certification. If certification was improperly granted, or the work allowed thereunder is excessive or not required to protect the health and safety of citizens of the Commonwealth, the Department may revoke the emergency certification, condition the work permitted thereunder, or take such other action as it deems appropriate.

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. Superior Court
No. 871150

ANNE PLACE, ROGER CHAPDELAINE and DORIS CHAPDELAINE THEODORE ROLFE, RONALD WILSON and JOAN WILSON, PETER MASON

Plaintiffs,

vs.

EUNICE D. BURLEY, JOHN W. DOANE, HARRY LEVI, JOHN H. TYNER, DOUGLAS WELLS, ANDREW P. YOUNG, JR. and CATHERINE ABREAU, as they constitute the MEMBERS OF THE TOWN OF CHATHAM CONSERVATION COMMISSION, the ARMY CORPS. OF ENGINEERS, and the COMMONWEALTH OF MASSACHUSETTS,

Defendants.

VERIFIED COMPLAINT

(Filed Dec. 21, 1987)

Now comes the Plaintiffs in the above-entitled action and say:

1. Plaintiffs are the owners of property located in Chatham, Barnstable County, Massachusetts as shown on the sketch attached hereto and incorporated herein by reference as Exhibit 1.

2. Defendants are members of the Town of Chatham Conservation Commission, the Army Corps. of Engineers and the Commonwealth of Massachusetts.

3. Plaintiffs are the owners of waterfront property in Chatham, Barnstable County, Massachusetts which borders Chatham Harbor. In January and February of 1987, the barrier beach, known as North Beach, was breached by the Atlantic Ocean; the break in the beach is now approximately one mile wide and is due east of the properties of the Plaintiffs.

4. At the time of bringing this Complaint, the private beach has eroded approximately 65 feet since October 1987 and the large waves and high tides within 72 hours prior to the filing of this Complaint have eroded the beach at the various properties up to approximately 8 feet.

5. The Plaintiff's allege that if the erosion is not contained, it will only be a matter of days before the Plaintiffs' properties are forever lost to the Atlantic Ocean.

6. On Thursday, December 10, 1987, the Plaintiffs and their representatives met with the Chatham Conservation Commission (hereinafter "Commission") and the representatives of the Department of Environmental Quality Engineering (hereinafter "D.E.Q.E."), both of whom have the responsibility to enforce the provisions of M.G.L. Ch. 131, §40.

7. The Commission and the representatives of D.E.Q.E. refused to grant permission to install a temporary rock revetment. They did give permission to install

large sand bags. However, the sand bags have proven to be inadequate to the task.

8. In accordance with the Commission and D.E.Q.E.'s recommendations, the owners of the property shown on Exhibit 1 as "Butler and Coxhead" have spent $8,000.00 to install a filter cloth and they also constructed a tubular sand filled revetment which has failed completely.

9. The evidence of the last 72 hours with the high tides and high surf, and the rapid rate of erosion makes it clear that unless this Court grants the property owners the right to install the rock revetment, the Plaintiffs will suffer irreparable harm. In contrast, the defendants will not stand to be harmed in any way since the allowance of these necessary preventative measures would serve the public good and promote the public's welfare and safety.

10. The Conservation Commission has informed the Plaintiffs that it will take months to complete the application process necessary to obtain the approval for the installation of a rock revetment. The Plaintiffs have already retained an engineering firm to begin work on those plans. The engineering firm, known as Engineering Information Technology, Inc., in consultation with Dr. Jerome J. Connor, a Professor at Massachusetts Institute of Technology, has indicated to the Plaintiffs that unless a temporary rock revetment is installed, the delay occasioned by the administrative process would cause the loss of the residences involved which would result in irreparable harm to the Plaintiffs. The temporary rock revetment proposed by the Plaintiffs was designed by Dr. Connor

(See letter of Dr. Connor, with attachment, attached hereto and incorporated herein by reference as Exhibit 2).

11. It is absolutely necessary that plaintiff's be allowed to take emergency measures during the time their plans and drawings are being prepared for presentation to the Conservation Commission in order to prevent permanent irreparable harm.

12. Plaintiff's proposal is to contruct [sic] a temporary rock revetment by digging a shallow trench at the toe of the bank. A filter cloth would be placed in the trench up unto the bank and a heavy toe stone, approximately 2 to 2½ tons, would be placed in the trench and two additional 2-ton boulders would be placed on the bank to hold the filter cloth in place.

13. The purpose of the placement of the boulders is to break the force of the waves while the filter cloth is designed to keep the rocks in place. This design is the result of many years of experience by Dr. Connor.

14. Under the current order of the Commission the Plaintiffs are unable to take the necessary precautions to protect their property and safety.

15. Without these preventative measures, the health and safety of not only the plaintiffs, but the health and safety of the immediate area is endangered.

16. If the Plaintiffs act without the authority of this Court, or without obtaining permission of the Commission, each property owner would be subject to a fine of up to $1,000.00 a day and the contractor of the property owners would be subject to a fine of up to $25,000.00 a day.

17. A controversy exists between Plaintiffs and Defendants.

WHEREFORE, Plaintiffs request a temporary restraining order against the Town of Chatham Conservation Commission, the Army Corps. of Engineers, and the Commonwealth of Massachusetts, or any agency thereof, to prevent or preclude them from bringing any administrative action whatsoever to have the Plaintiffs remove the temporary rock revetment described herein until such time as this issue has been settled or adjudicated; after Notice and hearing on the merits, that a preliminary injunction issue that will prevent or preclude the Town of Chatham Conservation Commission, the Army Corps. of Engineers and the Commonwealth of Massachusetts, or any agency thereof, from bringing any administrative action whatsoever to have the Plaintiffs remove the tempoary [sic] rock revetment described herein until such time as this issue has been settled or adjudicated; after trial on the merits that a permanent injunction issue that will prevent or preclude the Town of Chatham Conservation Commission, the Army Corps. of Engineers and the Commonwealth of Massachusetts, or any agency thereof, from bringing any administrative action whatsoever to have the Plaintiffs remove the temporary rock revetment described herein until such time as this issue has been settled or adjudicated, and for such other and further relief as the Court deems just and proper.

Dated: December 21, 1987

Anne Place, et al,
Plaintiffs, by their
attorney,

/s/ William F. Riley
William F. Riley, Esq.
Teresa M. McCormick,
Esq.
Toabe & Riley
784 Main Street
P.O. Box 707
Chatham, MA 02633
(617) 945-0502

CERTIFICATE OF VERIFICATION

I, /s/ Peter Mason, of Chatham, Massachusetts state that I am a plaintiff in the attached action and that I have reviewed this complaint and acknowledge that to the best of my knowledge, information and belief, the foregoing complaint contains true and accurate statements of the facts involved in this matter.

Signed under the pains and penalties of perjury,

Dated: December 21, 1987

/s/ Peter Mason
PETER MASON

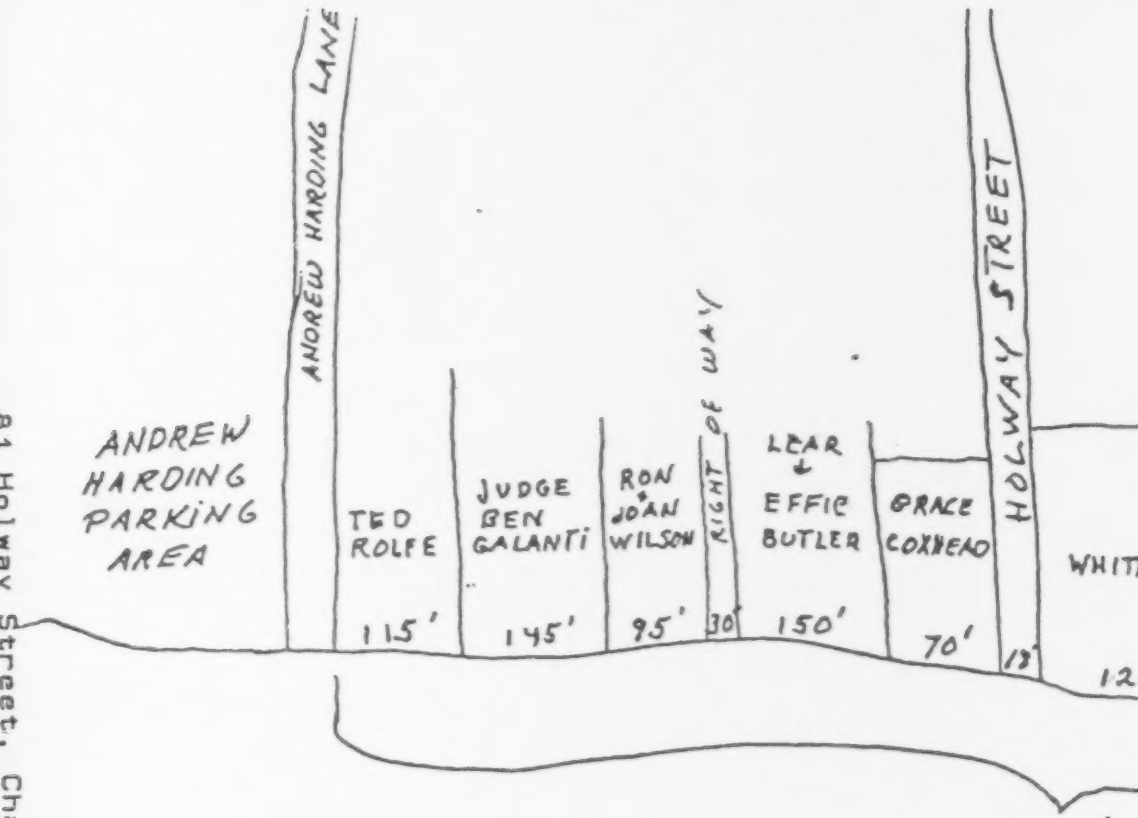
COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss December 21, 1987.

Then personally appeared the above-named and acknowledged the execution of the foregoing instrument to be free act and deed, before me,

/s/ Teresa M. McCormick
Notary Public

My commission expires: 1/7/94



81 Holway Street, Chatham, MA 02633

PROPERTIES (INCLUDI
IMMEDIATE AND LONG

B.R.E.A.C.H.

Beach Reclaimation Enactment Association of Chatham Harbor

G HOLWAY ST.) REQUIRING
TERM PROTECTION.

JEROME J. CONNOR, Sc.D.
73 WAVERLY STREET
ARLINGTON, MASS. 02174

648-3992

10 December 1987

William Riley, Esq.
784 Main Street
P. O. Box 707
Chatham, Massachusetts 02633

Dear Mr. Riley:

This letter concerns the situation that presently exists along the coastal region in the Watch Hill area of Chatham. I reviewed the area on 5 December, and also have examined the solution proposed by the BSC group. In my opinion, an emergency situation exists and immediate action must be taken to prevent further damage. The solution proposed by the BSC Group is not feasible, and will not provide the short term protection that is needed. I believe the solution I have proposed to the Chatham Conservation Commission (letter from the BREACH Group to the Commission dated 5 December 1987) will provide the necessary short term protection and will not damage the area. Conservsely [sic], it will prevent damage. Furthermore, the stones can be readily removed from the beach without inflicting permanent damage to the beach. In summary, use of a filter cloth blanket covered with stones represents the most realistic solution and experience has shown that it has minimal impact on the beach.

Sincerely yours,

/s/ Jerome J. Connor
Jerome J. Connor, Sc.D.

JJC:slw

Commonwealth of Massachusetts
Middlesex, S.B. Date 12/10/87
Then personally appealed the above named
JEROME J. CONNOR
and acknowledged the foregoing instrument
to be his free act and deed, before me
Brian J. Connor, Notary Public
My Commission Expires October 7, 1994

/s/ Brian J. Connor

B.R.E.A.C.H.

Beach Reclamation Enactment Association of Chatham Harbor

To the Conservation Commission
Town Offices, Chatham, MA 02633

From: BREACH

Based on a review of the proposal submitted by BSC, and consultation with Dr. Jerome Connor, Professor of Civil Engineering at M.I.T.; and Dr. Grahem Giese, of the Woods Hole Oceanographic Institute; it is evident that the solution is not a feasible one for the following reasons:

1. Solutions based on sand bags and Longard tubes is not effective for waive heights exceeding five (5') feet

[Refer U.S. Army Corps of Engineers Handbook pages 124 & 125]

2. Plastic fabrics deteriorate under attack by sunlight, the vandalism of man and ice, and may not last more than a few months [Reference U.S. Army Corps of Engineer Handbook pages 68 & 69].

3. The mechanism that is occuring is a combination of bank erosion and beach erosion. The BSC solution would increase the wave reflection and accelerate the beach erosion and at the same time it does not offer adequate protection for the bank behind it.

A solution which is generally recognized as being most effective is an irregular stone revetment. [Ref. U.S.Army C.of E. page 105 as opposed to page 100] As an emergency measure we are requesting permission to loosely place large stones of approx. two (2) plus tons upon filter cloth near the tow of the bank. (See attached plan BSC Drawing #3604-00) above mean high water mark. This solution conforms to the spirit of the nature of emergency orders [e.g. the rocks may be moved or removed more readily than the solution proposed by BSC]. The loosely placed stones will dissipate the wave energy and the filter cloth would minimize bank erosion. We wish to emphasize the fact that the erosion process is accelerating and action is needed immediately. We have consulted with Prof. Jerome Connor and his engineering company E.I.T., to arrange for a contractor and supervisory personnel who are ready to begin work immediately upon your notification. Please refer all future correspondence on this matter to Mr. John Whelan, with copies to Peter Mason and Robert Weaver [see attached cards].

Your cooperation will be most appreciated.

Respectfully,

Anne Place/Peter Mason /s/ Anne Place/Peter Mason 12-5-87
Roger & Doris Chapdelaine /s/ Roger Chapdelaine Doris Chapdelaine 12/5/87
John and Charles Whelan /s/ John Whelan Charles Whelan
Fairfield Whiting /s/ John Whelan for Fairfield Whiting
Grace Coxhead /s/ John Whelan for Grace Coxhead
Effie Butler /s/ Judith Butler for Effie Butler 5 DECEMBER 1987
Robert & Winfred Lear /s/ John Whelan for Winfred Lear
Ronald & Joan Wilson /s/ Ronald Wilson 12-5-87
Benjamin Galanti /s/ Benjamin Galanti PW 12-5-87
Ted Rolfe /s/ Ted Rolfe PW 12-5-87

81 Holway Street, Chatham, MA 02633

[p. 67] COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. Superior Court

JOAN WILSON, Et Al, Plaintiffs	89-881
- vs -	
COMMONWEALTH OF MASSACHUSETTS, Et Al, Defendants	

DEPOSITION of ROBERT E. WEAVER, taken on behalf of the Plaintiffs, pursuant to notice under Rule 30 of the Massachusetts Rules of Civil procedure, before Norma J. Douglas, a Notary Public in and for the Commonwealth of Massachusetts, at the offices of Nicholas Soutter, Esq., One Washington Street, Suite 208, Wellesley, Massachusetts, commencing at 10:00 a.m., Wednesday, May 11, 1994.

HAROLD GABRIEL (617) 969-4791
15 Van Wart Path, Newton Centre, MA 02159
FAX (617) 964-1321

* * *

[p. 68] information. When he determines what he would like for more information, then he puts that down; what is referred to as scope, which gives you the perimeters that the environmental impact report will include.

Q Did you read this scope, sir, some time after it came out?

A Yes.

Q Did you advise your clients as to how long it might take to prepare this document?

A I did.

Q What did you tell them with respect to time preparation?

A Based on the scope that was outlined in that original requirement and running it through our office, we determined it would take a minimum of a year to complete an environmental impact report of that scope.

Q Did you suggest an approximate price for doing this work?

A Yes, I did.

Q What was that price?

A It would have been $100,000.

[p. 69] Q Did either Wilson or Rolfe, if you know, ever get a hearing date from the department?

A No.

Q Did they ever receive prefiled testimony from the department?

A No.

Q Would it have been possible, sir, to preserve the Wilson house for a period of more than a year, forgetting about the cost?

A Sure. We could have preserved it indefinitely.

Q Provided they were willing to pay the $36,000 a year; is that correct?

A Yes.

Q At some time, sir, did you become aware there was a change in definition of dune area under the regulations?

A Yes.

Q Do you recall how that came about?

A Gary Clayton, who was head of DEQE division of wetland and waterways, sent a letter to the Chatham Board of Selectmen or the Conservation Commission in December of 1988, clarifying what he would except as a coastal bank as opposed to what

* * *

[p. 1] COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. Superior Court
C.A. No. 89-881

****

JOAN WILSON, ET AL.,
Plaintiffs

vs. AFTERNOON SESSION

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants

****

CONTINUED DEPOSITION OF ROBERT E. WEAVER, taken on behalf of the Plaintiffs, pursuant to the Massachusetts Rules of Civil Procedure, before Maryellen Coughlin, CSR/RPR, a Notary Public within and for the Commonwealth of Massachusetts, at the Law Offices of Nicholas B. Soutter,

One Washington Street, Wellesley, Massachusetts, on Wednesday, May 11, 1994, commencing at 1:00 p.m.

HAROLD A. GABRIEL, CSR
15 Van Wart Path
Newton Centre, Mass. 02159
(617) 969-4791
FAX (617) 964-1321

* * *

[p. 104] anything.

Q Did you file an emergency E.N.F. with regard to those properties?

A I filed for everybody. I filed for all the properties involved. When the emergency authorizations came out, they only applied to the properties that had not been appealed.

Q That had not been appealed?

A Right.

Q All right, I see what you are saying. In other words, that the department had not appealed?

A That's right.

Q Okay.

A The way I see it, I could have gone ahead and built these seawalls anyway.

Q On the Wilson and Rolfe properties?

A On appeal orders of condition from the conservation commission.

Q You could have done that after you got the March 4th superceding orders, is that what you are saying?

A The superceding orders only apply to Wilson, Rolfe and Galanti.

* * *

Exhibit 7

The Commonwealth of Massachusetts

Executive Office of Environmental Affairs

Department of Environmental Quality Engineering
Division of Wetlands and Waterways Regulation
One Winter Street, Boston 02108

[SEAL]

S. RUSSELL SYLVA
Commissioner

MEMORANDUM

To: Charles Natale,
Elizabeth Kouloberas

From: Gary Clayton, Division Director /s/ Gary Clayton

Date: March 8, 1988

Subj: Emergency Action Under MEPA (301 CMR 11.11) – Chatham

The Department is currently reviewing requests under the Wetlands Protection Act and the Waterways Regulation Program for the construction of a stone revetment on the shoreline of Pleasant Bay, Chatham. This work requires authorization not only from the Department but also from the Secretary of Environmental Affairs pursuant to M.G.L. c.30, s.61 through 62H.

After carefully reviewing this situation, I have concluded that the MEPA emergency provision at 301 CMR 11.11 applies. Therefore, you should prepare to issue the

Superceding Orders of Conditions or Emergency Authorization before the initiation/completion of the MEPA process. Please advise the applicants that they must file an Environmental Notification Form with MEPA that states as much of the nature of the project as is then known within 10 days of the commencement of the project by the proponent. Within 60 days of the initiation of the project, the proponent shall commence full compliance with the provisions of the MEPA regulations.

Received and concurred with by
Steven C. Davis for James S. Hoyle
3/9/88

GC/dr

cc: Steve Davis, MEPA

return cc: to G. Clayton
Hold this copy here.
OK
Barbara 3/11/88

NICHOLAS B. SOUTTER
ATTORNEY AT LAW
ONE WASHINGTON STREET
WELLESLEY, MASSACHUSETTS 02181

617-237-6360

OFFICE OF THE SECRETARY OF
ENVIRONMENTAL AFFAIRS

NICHOLAS B. SOUTTER

AVOCAT
RECHTSANWALT
ABOGADO
ADVOGADO
$4C4157S94552

September 1, 1988

MEPA
100 Cambridge Street
20th Floor
Boston, MA 02202

RE: DEQE Hearing Docket #88-94, DEQE File #10-653 (Buler/Roberts)
DEQE Hearing Docket #88-95, DEQE File #10-654 (Wilson)
DEQE Hearing Docket #88-96, DEQE File #10-655 (Galanti)
DEQE Hearing Docket #88-97, DEQE File #10-656 (Rolfe)

Dear Sir or Madam:

Enclosed please a MEPA Environmental Notification Form filed in relation to the above-captioned petitions and hearings.

This filing is made pursuant to the DEQE Order to Applicant Concerning MEPA Compliance of August 22, 1988 (attacched [sic]).

Thank you for your attention to this matter.

Sincerely,

/s/ Nicholas B. Soutter
Nicholas B. Soutter

NBS/psm
Enclosures

Exhibit 15

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
400 Cambridge Street
Boston, Massachusetts 02202

[SEAL]

MICHAEL S. DUKAKIS
GOVERNOR

JAMES S. HOYTE
SECRETARY

CERTIFICATE OF THE SECRETARY OF ENVIRONMENTAL AFFAIRS ON THE ENVIRONMENTAL NOTIFICATION FORM

PROJECT NAME	:	Breach Project
PROJECT LOCATION	:	Chatham
EOEA NUMBER	:	7345
PROJECT PROPONENT	:	Breach Group
DATE NOTICED IN MONITOR	:	September 27, 1988

Pursuant to the Massachusetts Environmental Policy Act (G.L., c.30, s.62-62H) and Sections 11.06 of the regulations implementing MEPA (301 CMR 11.00), I hereby determine that the above project requires the preparation of an Environmental Impact Report.

This project is an attempt to protect developed areas in Chatham from the damaging wave climate resulting from the 1987 breach to the Nauset Beach Barrier Beach. Ten home owners were involved. To date three homes have been lost and several other owners are not sure they should move ahead with the expensive solutions. The

project requested emergency consideration under MEPA regulation 11.11, which was granted in March. This allows enough action to protect the public. At this time five or more additional owners are seeking to protect their property and others are trying to stabilize existing beaches.

It is my conclusion that further environmental analysis is required and that these analyses must evaluate all the proposals for the section from the town fishing pier to Morris Island. The options are an integrated solution to the entire section which appears to be threatened for approximately ten years each century, or multiple short segments which may exaggerate the erosion to each segment not so protected. At a minimum the EIR must firmly identify which segments are to be built, the impacts of each to adjacent properties, available mitigation and a committment [sic] to minimize said impacts.

EOEA #7345 ENF Certificate October 27, 1988

At this time I urge all owners anticipating armoring or other alteration to the bank within the next year to file with the MEPA unit immediately. Upon identifying all proposed actions, I shall anticipate a single EIR to address the issues in this preliminary scope.

SCOPE

I. The EIR must identify the properties where erosion control structures are to be or have been constructed between the fish pier on the north and Morris Island.

II. Describe each of the proposed and existing structures. Include plans for all proposed structures.

III. The EIR must evaluate the impacts of accelerated erosion on properties to either side of each segment. Available mitigation must be evaluated and a mitigation package proposed. The analysis must be specific for the specific protection designed for each site.

IV. Alternatives, such as nourishment of the off shore sand bar, beaches, or dunes, as a supplement to or replacement for armoring, must be evaluated.

October 27, 1988 /s/ James S. Hoyte
DATE JAMES S. HOYTE,
SECRETARY

Comments: Chatham Conservation Commission
SOS Foundation, Inc. Petition
CZM
CCP&EDC
John Molander
Darlene Curly

NICHOLAS B. SOUTTER
ATTORNEY AT LAW
ONE WASHINGTON STREET
WELLESLEY, MASSACHUSETTS 02181

617-237-6360

NICHOLAS B. SOUTTER

AVOCAT
RECHTSANWALT
ABOGADO
ADVOGADO
$4C4157594552

September 12, 1988

Mary Piazza, Docket Clerk
DEQE
One Winter Street
Boston, MA 02108

RE: DEQE Hearing Docket #88-94, DEQE File #10-653 (Butler/Roberts)
DEQE Hearing Docket #88-95, DEQE File #10-654 (Wilson)
DEQE Hearing Docket #88-96, DEQE File #10-655 (Galanti)
DEQE Hearing Docket #88-97, DEQE File #10-656 (Rolfe)

Dear Ms. Piazza:

Enclosed for filing please find a Motion for Dates Certain in relation to the hearings in the above-captioned matters.

Thank you for your attention to this matter.

Sincerely,

Nicholas B. Soutter

NBS/psm

cc. Patricia Lewis, Hearing Officer
Matthew Watsky, Esq.

DEQE file numbers:

Name	Hearing Doc.	File
Lear	88-94	10-653
Wilson	88-95	10-654
Galanti	88-96	10-655
Rolfe	88-97	10-656

Motion For Dates Certain

Date: 090988

Petitioners request that dates certain be set for completion of Pre-filed testimony by Department, Discovery and Hearing of this matter.

1) The Department has had 12 weeks since the Prehearing Conference in which to prepare witnesses.

2) Petitioners sent a full memo on voluntary discovery to Department 3 weeks ago. There has been no agreement as to any of the matters contained therein.

3) An Environmental Notification Form has now been filed. It is believed that to wait for MEPA to process this form will delay these proceedings an additional 1 to 3 months.

Petitioners are in dire financial straits.

Petitioners' property is being eroded at a rate of six inches a day. A further delay of 1 month will result in the loss of at least 15 more feet. The assesed [sic] value of such a loss is over $150,000. Morever [sic], the Petitioners' houses are in peril. They have a fair market value of approximately $200,000. Petitioners' losses so far amount to $400,000. Total losses at the end of a month will be close to $750,000. Adjacent wetlands will be near flooding.

The following deadlines are requested:

1) To reach Agreement on voluntary discovery: September 20, 1988.

2) For completion of Department's Pre-filed Testimony and responses to discovery requests: September 23, 1988.

3) For completion of additional discovery: October 7, 1988.

4) Hearing: as soon thereafter as is convenient for this Court.

Estimated time needed for cross-examination of 3 Department witnesses: 1/2 a day each or 1.5 days.

Respectfully submitted

_____

Nicholas B. Soutter
for Petitioners

NICHOLAS B. SOUTTER
ATTORNEY AT LAW
ONE WASHINGTON STREET
WELLESLEY, MASSACHUSETTS 02181

617-237-6300

NICHOLAS B. SOUTTER

AVOCAT
RECHTSANWALT
ABOGADO
ADVOGADO
$4C4157594552

October 7, 1988

Mary Piazza, Docket Clerk
DEQE
One Winter Street
Boston, MA 02108

RE: DEQE Hearing Docket #88-94, DEQE File #10-653 (Butler/Roberts)
DEQE Hearing Docket #88-95, DEQE File #10-654 (Wilson)
DEQE Hearing Docket #88-96, DEQE File #10-655 (Galanti)
DEQE Hearing Docket #88-97, DEQE File #10-656 (Rolfe)

Dear Ms. Piazza:

Enclosed for refiling please find a Motion for Dates Certain in relation to the hearings in the above-captioned matters.

Thank you for your attention to this matter.

Sincerely,

Nicholas B. Soutter

NBS/psm

cc. Patricia Lewis, Hearing Officer
Matthew Watsky, Esq.

DEQE file numbers:

Name	Hearing Doc.	File
Lear	88-94	10-653
Wilson	88-95	10-654
Galanti	88-96	10-655
Rolfe	88-97	10-656

Motion For Dates Certain

Date: 100788

Petitioners request that dates certain be set for completion of Pre-filed testimony by Department, Discovery and Hearing of this matter.

1) The Department has had 16 weeks since the Prehearing Conference in which to prepare witnesses.

2) Petitioners sent a full memo on voluntary discovery to Matthew Watsky, Esq. 8 weeks ago. There has been no agreement as to any of the matters contained therein.

3) An Environmental Notification Form has now been filed. It is believed that to wait for MEPA to process this form will delay these proceedings an additional 1 to 3 months.

Petitioners are in dire financial straits.

Petitioners' property is being eroded at a rate of six inches a day. A further delay of 1 month will result in the loss of at least 15 more feet. The assessed value of such a loss is over $150,000. Morever [sic], the Petitioners' houses are in peril. They have a fair market value of approximately $200,000. Petitioners' losses so far amount to $400,000. Total losses at the end of a month will be close to $750,000. Adjacent wetlands will be near flooding.

The following deadlines are requested:

1) To reach Agreement on voluntary discovery: October 17, 1988.

2) For completion of Department's Pre-filed Testimony and responses to discovery requests: October 20, 1988.

3) For completion of additional discovery: October 21, 1988.

4) Hearing: as soon thereafter as is convenient for this Court.

Estimated time needed for cross-examination of 3 Department witnesses: 1/2 a day each or 1.5 days.

Respectfully submitted

_____

Nicholas B. Soutter
for Petitioners

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

APPEALS COURT
NO. 95-P-565

WILSON, ET AL.,

Plaintiffs

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant

AFFIDAVIT OF ROBERT E. WEAVER

1) I am Robert E. Weaver. I reside at 181 Community Road in Davis, North Carolina.

2) I am familiar with the coast of Chatham, Massachusetts having participated in the design, permitting and or building of 28 seawalls in Chatham and 31 others on the rest of the Cape between 1986 and 1991. At the time I was a Massachusetts licensed construction supervisor.

3) I have examined copies of all 64 Notices of Intent to build seawalls (seawall permit applications) filed for Chatham in the period from 1987 to 1991.

4) Average time from the filing of the Notice of Intent through approval and expiration of the appeal period was about 90 days.

5) On the record, no ENFs were filed for projects after March 14, 1988 except that filed by plaintiffs on September 1, 1988.

6) No EIR was filed for any project. An EIR was done for the whole area some 2 or 3 years after the last seawall was built.

Signed under the pains and penalties of perjury this 17th day of May, 1995.

/s/ Robert E. Weaver
Robert E. Weaver

(Seal) *The Commonwealth of Massachusetts*
Executive Office of Environmental Affairs
100 Cambridge Street, Boston, 02202

WILLIAM F. WELD
GOVERNOR

(617)727-9800

November 25, 1991

PAUL CELLUCCI
LIEUTENANT GOVERNOR

SUSAN F. TIERNEY
SECRETARY

Mr. Thomas W. Joy, P.E.
Coastal Engineering Co.
260 Cranberry Highway
Orleans, MA 02653

Re: EOEA #7345/8133 Shorefront Protection – Chatham Breach/Nelson – Artificial Dune – 1991 emergency status

Dear Mr. Joy:

The purpose of this letter is to request an update from you on preparation of the Environmental Impact Report (EIR) that has been required for the construction of certain coastal protection structures in Chatham. As you know, following the breach of the Nauset Barrier in 1987, the Secretary of Environmental Affairs received several emergency requests under the Massachusetts Environmental Policy Act from landowners in Chatham for the construction of coastal protection structures. These structures needed several state agency approvals from DEP/Waterways, DEP/SE/Wetlands, DEP/WPC and MCZM. These proposals exceeded the MEPA thresholds and required MEPA compliance prior to state action. The Secretary approved those emergency requests under MEPA regulation 301 CMR 11.11.

MEPA regulation 11.11 requires expeditious compliance with the MEPA regulations by the filing of Environmental Notification Forms within 10 days of commencement of the project and initiation of full compliance with the regulations including any needed Environmental Impact Report preparation within 60 days. Emergency action taken prior to completion of the ENF and EIR process is to be the minimum needed to avoid or eliminate the imminent threat to the environment.

Compliance with MEPA for these structures is long overdue. Environmental Notification Forms were first filed in 1988 and published in the September 27, 1988 *Environmental Monitor.* A scope was issued on October 27, 1988. An additional ENF was filed in February 1990, and another scope issued in March 1990. Subsequent Notices of Project Change identifying additional proposals have also been filed. No EIRs have been submitted to the Secretary for review.

There have been several meetings since the fall of 1988 to discuss these projects. A meeting was held on December 28, 1989 to ascertain the current status of the projects and to review the EIR requirements. Since that time, comments from DEP/Waterways and MCZM have reaffirmed the need for further analysis of impacts and the development of mitigation measures. Further state meetings were held on January 19, 1990 and October 19, 1990.

The following projects are currently seeking approval through the DEP/Waterways:

Applicant	Property	Waterways #	Wetlands #
Pfeffer	2 Water St.	89-136	SE 10-705
Ventola	144 Water St.	89-138	SE 10-749
Harper	12 Mistover Lane	89-137	SE 10-762
Molander	17 Mistover Lane	89-191	SE 10-760
Galanti	41 Andrew Harding L	89-125	SE 10-655 Deni
Wilson	43 Andrew Harding L	89-126	SE 10-654 Deni
Rolfe	53 Andrew Harding L	89-124	SE 10-656 Deni
Roberts/Lear	Lot 10, Holway St.	89-127	SE 10-653 Deni
Butler/Roberts	74 Holway St.	89-128	SE 10-652
Whiting	75 Holway St.	89-130	SE 10-650
Coxhead	78 Holway St.	89-129	SE 10-651

Applicant	Property	Waterways #	Wetlands #
Whelan	81 Holway St.	89-131	SE 10-649
Chapdelaine	83 Holway St.	89-132	SE 10-648
Place/Mason	58 Watch Hill Way	89-133	SE 10-647
Zisette	70 Watch Hill Way	89-134	SE 10-706
Burroughs	80 Watch Hill Way	89-135	SE 10-704
Brogan	88 Watch Hill Way	89-146	SE 10-686
Williams/Dimm	Quasson Road	89-201	SE 10-715
Hartley	67 Wilkey Way	89-068	SE 10-744
Russell	Lot 2B, Briggs Way	89-190	SE 10-761
Garre	38 Briggs Way	89-147	SE 10-752
Tn of Chatham	Chatham Lt Pk Lot	91-?	SE 10-966

The four applicants denied under the Wetlands Protection Act (Galanti, Wilson, Rolfe and Roberts/Lear) have requested Final Orders of Conditions from DEP/ Wetlands following an Adjudicatory Hearing. In addition Nelson, SE 10-804 at 27 Morris Island Road and Hicks, SE 10-855 at 40 Dune Drive are seeking Final Orders of Conditions from DEP/ Wetlands for construction of artificial dunes, following local and state denials. In addition the following parties have been identified by consultants as proposing coastal protection:

Chatham Beach and Tennis Club, 14 Main St.
Royden C. Sanders, 43 Morris Island Road
David Reynolds, 63 Morris Island Road
Charles and John Chapman, 67 Morris Island Road
John B. Horne, 8 Windmill Lane
William K. Doggett, Jr., 14 Windmill Lane
Charles Horne, Little Beach Road
Ronald Rudnick, Little Beach Road

Several other owners have built coastal structures in compliance with the Wetlands Protection Act above mean high tide which, as such, did not require a Chapter 91 Waterways License. With the dynamic environment at the site, some of the structures are now in the intertidal zone and may need Waterways licensing. DEP/Waterways should be consulted for a case by case decision.

A single EIR that addresses all the affected properties is still the desired process to evaluate the impacts and develop mitigation for the coastal protection strategies for the Chatham coastline between the Chatham Fish Pier and Morris Island. However, if a single EIR is infeasible or impractical, it is possible for groups of proponents located between gaps in the proposed coastal protection

to address the impacts and mitigation for their section as segments of the required Environmental Impact Report. Both a Draft EIR and Final EIR are required.

As far as the scope of the EIR is concerned, the only change from the 1988 and 1990 Certificates is that, for those properties where emergency structures have already been constructed, alternatives need not be considered. However all properties must be evaluated for mitigation to compensate for the loss of sediments from the eroding bank to the beach and nearshore system. Alternatives analysis is needed for all proposed structures not yet constructed, and any further protection proposed where emergency structures have been constructed (i.e., if protection is planned to a greater height, or if additional toe protection is needed). Perhaps the most important issue to be addressed is the evaluation of the significance of impacts to the identified gaps in the coastal protection and development of a mitigation plan to minimize these impacts. The mitigation will probably be needed until the breach migrates to the south and the specific section of shoreline again becomes an accretion zone.

Again, I ask that all other property owners, including the Town of Chatham, planning to request protection structures needing state approval, or with structures needing further state approval participate in the EIR preparation, including alternatives analysis, impact evaluation and mitigation development so the state agencies can act on their proposals. Compliance with the Massachusetts Environmental Policy Act is needed prior to each state agency acting on any but the emergency approvals for the shoreline protection, whether by issuing licenses

or permits or by the certification that the plans concur with state plans for the issuance of federal approvals needed for the structures.

If my staff can be of further assistance please call David Shepardson at (617) 727-5830 x304.

Sincerely,

/s/ Janet McCabe
Janet McCabe, Director
MEPA Unit

JM/DES/ds

enclosures: EOEA #7345 Scope – 10/27/88
EOEA #8133/7345 Scope – 3/14/90
EOEA Letter of 12/9/88 re: Emergency Authorizations
DEP/Waterways Application List
EIT Information – 3/29/90
MCZM comments – 3/15/91
DEP/WRP – 3/11/91

cc: EIT
MCZM
DEP/Waterways
DEP/SE/Wetlands
DEP/Boston/Wetlands
DEP/WPC/Boston
Mass. Attorney General
CCC
Chatham Conservation Commission
All Property Owners Referenced

February 23, 1993

Secretary
Executive Office of Environmental Affairs 20th Floor
100 Cambridge St.
Boston, MA 02202

Attention MEPA unit

RE: EIR for Aunt Lydia's Cove Breach Project
Chatham Breach Group [EOEA no. 7345]

Dear Secretary:

The EIR originally ordered for Chatham required study of the impact of every seawall, proposed or built, from the Fish Pier to Morris Island.

The present EIR covers half that area and ignores the impact of seawalls.

Every Chatham resident in the EIR area has a seawall. Seawalls have been allowed for residents' parking lots, tennis courts, empty lots and golf courses.

Under Massachusetts' own theories, these walls are starving the properties south of the EIR of the sand needed to protect them.

The only coastal homes lost in the EIR area are six nonresident properties.

Three of these were denied seawalls on the theory that their sand would stop flooding elsewhere.

The other three were told they could have seawalls if they built a seawall for the Town of Chatham and if they dumped at least $20,000 worth of sand in the water to stop flooding.

In short, nonresidents were expected to either sacrifice their houses or their savings to the theory that sand stops flooding.

When these houses were lost, the virtues of sand were lost in a frenzy of seawall building, most of it in dune areas.

No resident was asked to sacrifice his house, dump sand in the water or do favors for his neighbors.

All Massachusetts coastal cities and towns use seawalls. Twenty to thirty percent of the coast is protected by them.

In Chatham even residents' empty lots and playing fields have seawalls.

All Chatham residents threatened with flooding have seawalls.

All of the properties lost, all of the properties denied seawalls and all of the properties without seawalls are owned by nonresidents.

Nonresidents who have tried to bring this situation to the attention of the state have been told they cannot have even a hearing without first filing an EIR.

Yet 43 seawalls have been built in Chatham without an EIR.

There are plans to dredge the harbor and further damage nonresident properties without an EIR.

The proposed EIR covers an area where flooding has already been stopped and where all 20 Chatham residents have seawalls.

By contrast, in an area where flooding is widespread all of the 11 properties are without seawalls and all of these properties are owned by nonresidents.

These people must produce an extensive EIR *before* they can even hope for a seawall.

We have enclosed a brief on the appropriate regulations, a study of discrimination in Chatham and a synopsis of the use of federal money to implement that discrimination.

We intend to commence litigation to block this EIR if it becomes final.

Sincerely,

/s/ Nick Soutter
Nick Soutter

BRIEF ON THE LAW

The Phase I EIR whitewashes discrimination in Chatham.

Legally the EIR must show the need for every seawall in the entire EIR area and consider alternative measures (G.L.c. 30, sec. 62B, 301 CMR 11.07).

The present EIR (Phase I) limits its scope to an area where seawalls are already in place and then ignores the impact of the walls (draft EIR, sec. 6-1, p. 55).

These walls were built because MEPA granted Chatham residents emergency permits to build seawalls without EIRs (Phase I EIR appendix, correspondence dated November 25, 1991 of Janet McCabe, MEPA Unit, p. 2).

MEPA now insists that nonresidents who want to build seawalls will have to first submit a detailed EIR (Phase II) to show need and discuss alternative measures.

MEPA's actions are discriminatory and beyond its power.

A. What Are They Trying to Do?

The Phase I EIR is intended to ensure that Chatham residents who have walls keep them, and that nonresident properties without walls become undeveloped beaches.

A proper Phase I would show that the Phase I seawalls are built on coastal dune, making them presumtively [sic] illegal under the Commonwealth's Wetlands

Protection Act (G.L. c. 131, sec. 40) and completely illegal under Town of Chatham Wetland Bylaws.

The Phase II EIR is designed to ensure that nonresidents do not get seawalls.

Only nonresidents need an EIR before they can build seawalls.

Only nonresidents are denied appeals hearings because they don't have an EIR.

Only nonresidents must consider alternatives to seawalls.

The Phase II EIR will rely on the Commonwealth's discredited flood control regulations to continue the discriminatory pattern of denying seawalls to nonresidents that has marked the Chatham permit process to date.

B. Why They Can't Do This

MEPA cannot certify the Phase I EIR.

1. Emergency Status Discriminatorily Granted

The Phase I EIR cannot be fair. It ignores seawalls already built. These seawalls were permitted unfairly.

Acting under wetlands protection regulations, the Town of Chatham and DEP granted seawall permits to the Town of Chatham, Chatham residents, and nonresidents whose property protects Town and resident property.

The Town and DEP denied permits to nonresidents whose property didn't Protect the Town or residents.

MEPA's refusal to discuss bias in permitting and the construction of walls in dune areas ratifies discrimination.

2. Improper Emphasis on Emergency Permits

The Phase I EIR deals exclusively with emergency seawalls built between Aunt Lydia's Cove and the Chatham Beach and Tennis Club, inclusive.

It ignores owners who have a similar emergencies south of the Tennis Club because they are nonresidents.

The study must address the needs of those without seawalls. It cannot apply emergency standards in one place then ignore the same emergency in another place.

3. "Phased" EIRs are Illegal

MEPA regulations prohibit breaking project review into phases (301 CMR 11.16).

The regulations presume that project proponents would chop their studies up in ways that hide problems and "evade or deter review". The Phase I EIR justifies this fear.

4. MEPA Cannot Sanction Incomplete EIRs

Those with seawalls cannot avoid scrutiny.

"An environmental impact report *shall* contain statements describing . . . reasonable alternatives to the proposed project" (G.L.c 30, sec. 62B, emphasis added).

There is no exception to full MEPA compliance. Sec. 62B is applicable to emergency projects pursuant to G.L.c. 30, sec. 62H.

C. Conclusion

Chatham needs seawalls.

Whether they are allowed as emergencies (301 CMR 11.11, 310 CMR 10.06) or waivers (301 CMR 11.18), whether they were built on dune or bank, before or after 1978, all properties in the flood area need seawalls.

Any gap in Chatham's seawalls puts every property owner at risk.

The Chatham EIR must either admit that there is no alternative to seawalls for the entire flood area, or recommend the removal of all seawalls.

February 23, 1993

Massachusetts ridicules nonresident coastal homeowners as the authors of their own destruction [Ex.1].

The State never mentions the local broker and Property owner who sold the land. It does not discuss the local building permit received or the thousands of dollars of taxes paid for local services never used.

When a coastal home is lost, officials imply huge subsidized insurance payments received by the owner and paid for by taxpayers.

In fact, flood insurance is funded by homeowner premiums and the payout on the houses in Chatham has been less than 10% of their value.

There are plenty of taxpayer subsidies, however.

Coastal Zone Management, the agency responsible for nonresident permit denials, is almost entirely federally funded (Exhibit 1 is from CZM's newsletter).

When Chatham wants a seawall for a tourist attraction it gets a federal subsidy.

Federal money will be used to dredge Chatham Harbor.

Federal money is nonresident tax money given by citizens of other states. Its use to belittle and destroy nonresidents is contrary to the concept of a United States.

Exhibit 1

Coast Lines

WINTER STORMS – from cover –

In the short term, Civil Defense volunteers are at the scene, almost immediately, to move people from flooded areas, provide shelter, and comfort the displaced.

Financial assistance to repair and rebuild comes less readily. In the event of a very severe storm, like hurricane Gloria or the Blizzard of 1978, the damage in dollars may be great enough for the Governor to request, and the President to declare, a national disaster. Funds from

Washington are then available, and a joint state/federal task force is created to assess damages, identify reasons for the destruction, and recommend possible measures to prevent future losses.

In some cases, the task force finds it unwise to replace structures in high hazard areas, and federal funds will not be released for any structural repairs they do not recommend.

Some funds to repair and rebuild may also be available from the National Flood Insurance Program, though payments rarely compensate property owners fully for storm damage.

At the state level, funds are not regularly set aside to respond to storm damage, although money has been made available in the past through special legislative appropriations. While these monies may help to patch and replace, they do not address the long-term problem: how do we effectively protect property and lives from natural, recurring coastal hazards?

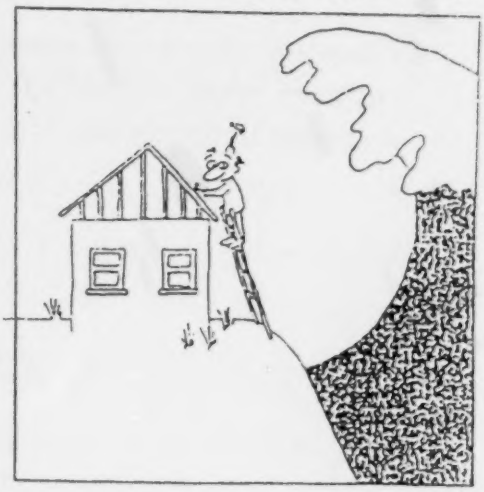
Following the New Year's storm, a special legislative commission was established to develop a storm response plan, that includes long-term planning as well as short term solutions.

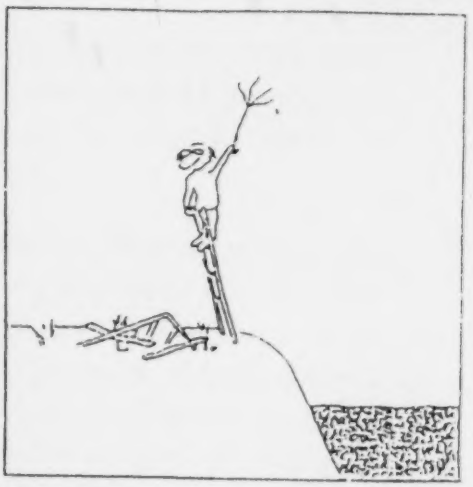
The commission's first task will be to document high hazard areas, and the costs and effectiveness of past repairs. Secondly, they will recommend alternative storm response strategies. For example, if a property is repeatedly damaged, despite repairs, state funds may be better spent acquiring rather than

* * *

coast·al haz·ard (kōst′əl hăz′ərd)

1. Pertaining to or having to do with danger; risk. in relationship with the seashore. 2. Natural demolition. 3. . . . a foolish man, which built his house upon the sand: And the rain descended, and the floods came, and the winds blew; Matthew 7:24-27.





4. $$!?&¢¢@★!!?&$!!

BEST AVAILABLE COPY

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. SUPERIOR COURT

January 12, 1994

Re: #89-881, Joan Wilson et al vs. Commonwealth of Massachusetts

Plaintiffs' motion to amend complaint with affidavit in support with defendant's opposition and plaintiffs' response to opposition was denied, by the Court, O'Neill, J.

/s/ Phyllis A. Day
CLERK

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS APPEALS COURT
A.C. NO. 95-P-565

JOAN WILSON, et al.,
Plaintiffs

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant

AFFIDAVIT OF NICHOLAS B. SOUTTER

I, Nicholas B. Soutter, am a member of the Massachusetts Bar.

In 1992, Robert K. Arena acting under my direction prepared a study of Notices of Intent filed in Chatham between 1987 and 1990 to build seawalls in the area from the Fish Pier to Morris Island.

The results of this study and a copy of the study itself were filed in the lower court proceedings seeking to amend the original complaint in this matter so as to include counts for discrimination.

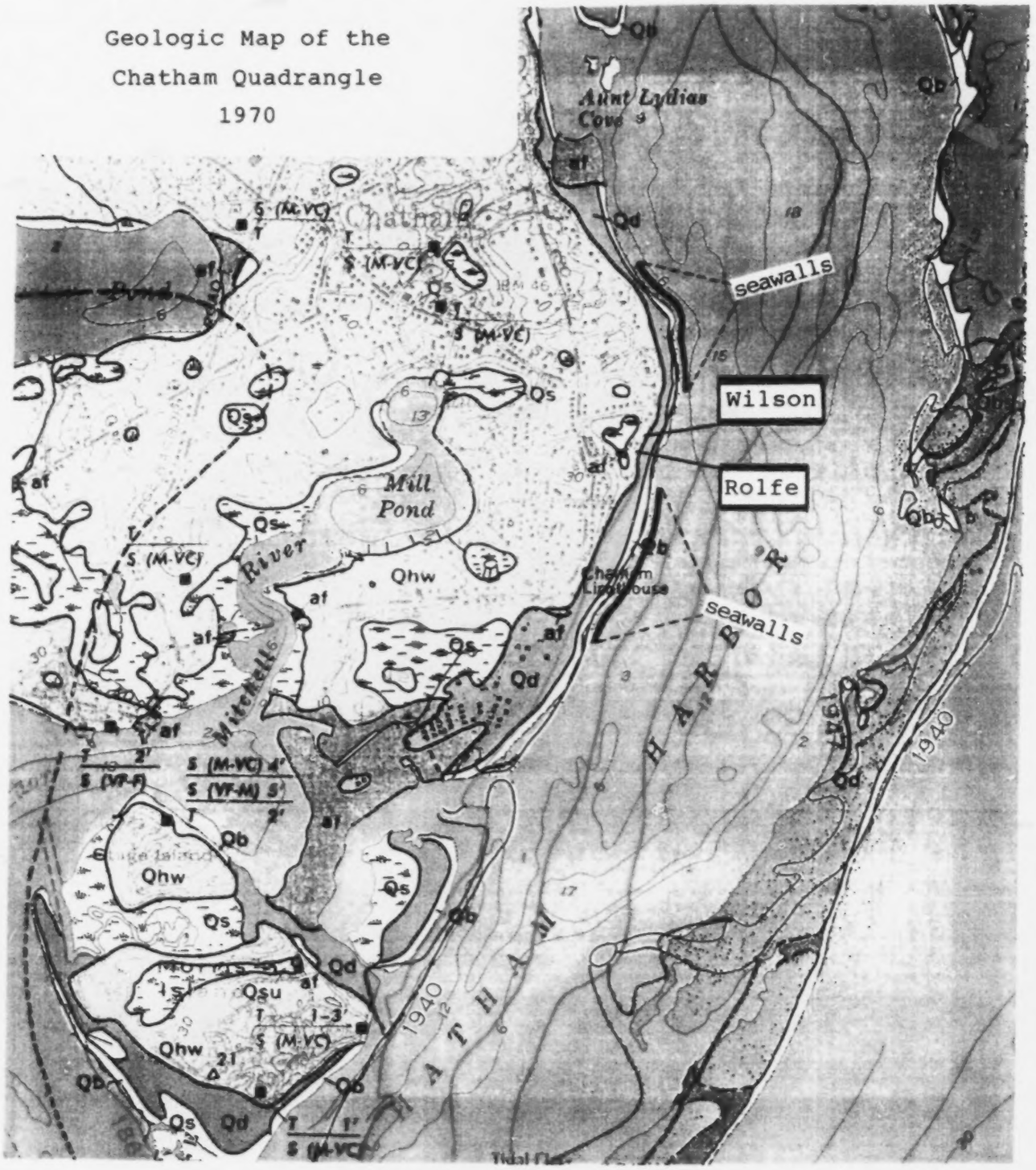
In 1994, I commissioned Robert E. Weaver to redo the study so as to align it with the two phases of the Environmental Impact Report. The maps and text entitled "*Discrimination in Seawall Permits Chatham, Massachusetts* Updated to February 15, 1995 Data Conformed to Environmental Impact Report" are substantially the same as the original study.

The facts contained herein represent accurate summaries of the Notices of Intent as described above.

Signed under the pains and penalties of perjury this 17th day of May, 1995.

/s/ Nicholas B. Soutter
Nicholas B. Soutter
One Washington Street
Suite 208
Wellesley, MA 02181
(617) 237-6300

Geologic Map of the
Chatham Quadrangle
1970



Qd

Dune deposits

Wind deposited sand to small pebbles derived from beach deposits

Qb

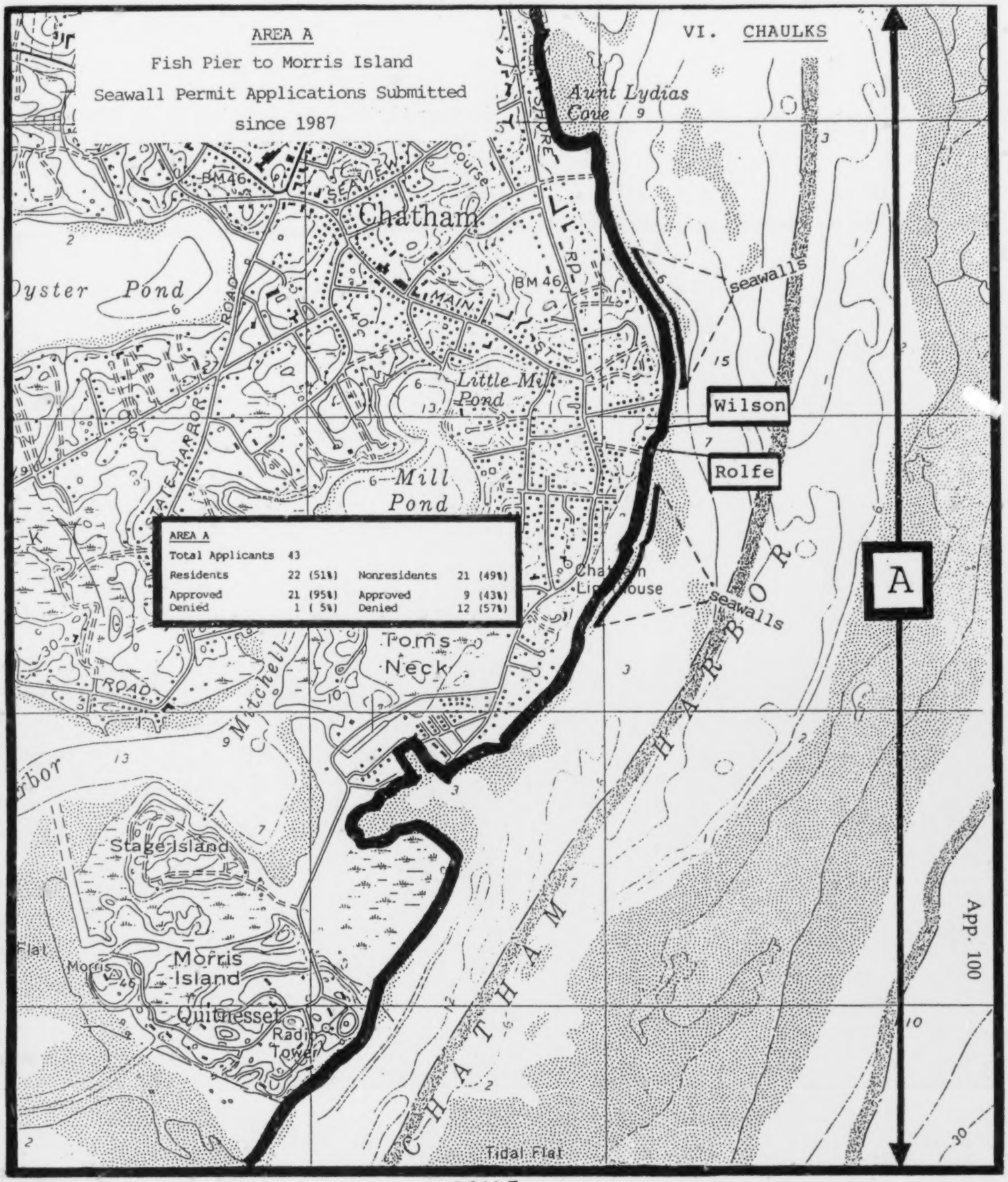
Beach deposits

Sand to small boulders deposited by waves and longshore currents. Beach deposits adjacent to glacial deposits may contain medium to very large boulders. Includes some fresh-water beach deposits in the vicinity of White and Schoolhouse Ponds

SCALE

1 ½ 0 1 MILE

1 .5 0 1 KILOMETER


AREA A
Fish Pier to Morris Island
Seawall Permit Applications Submitted
since 1987
VI. CHAULKS
Aunt Lydias Cove
Chatham
Oyster Pond
Little Mill Pond
Mill Pond
Toms Neck
Stage Island
Morris Island
Quitnesset
Radio Tower
Tidal Flat
seawalls
seawalls
Wilson
Rolfe
A
CHATHAM HARBORS
App. 100
AREA A
Total Applicants 43
Residents 22 (51%) Nonresidents 21 (49%)
Approved 21 (95%) Approved 9 (43%)
Denied 1 (5%) Denied 12 (57%)
SCALE
1 MILE
7000 FEET
1 KILOMETRE

Environmental Impact Report

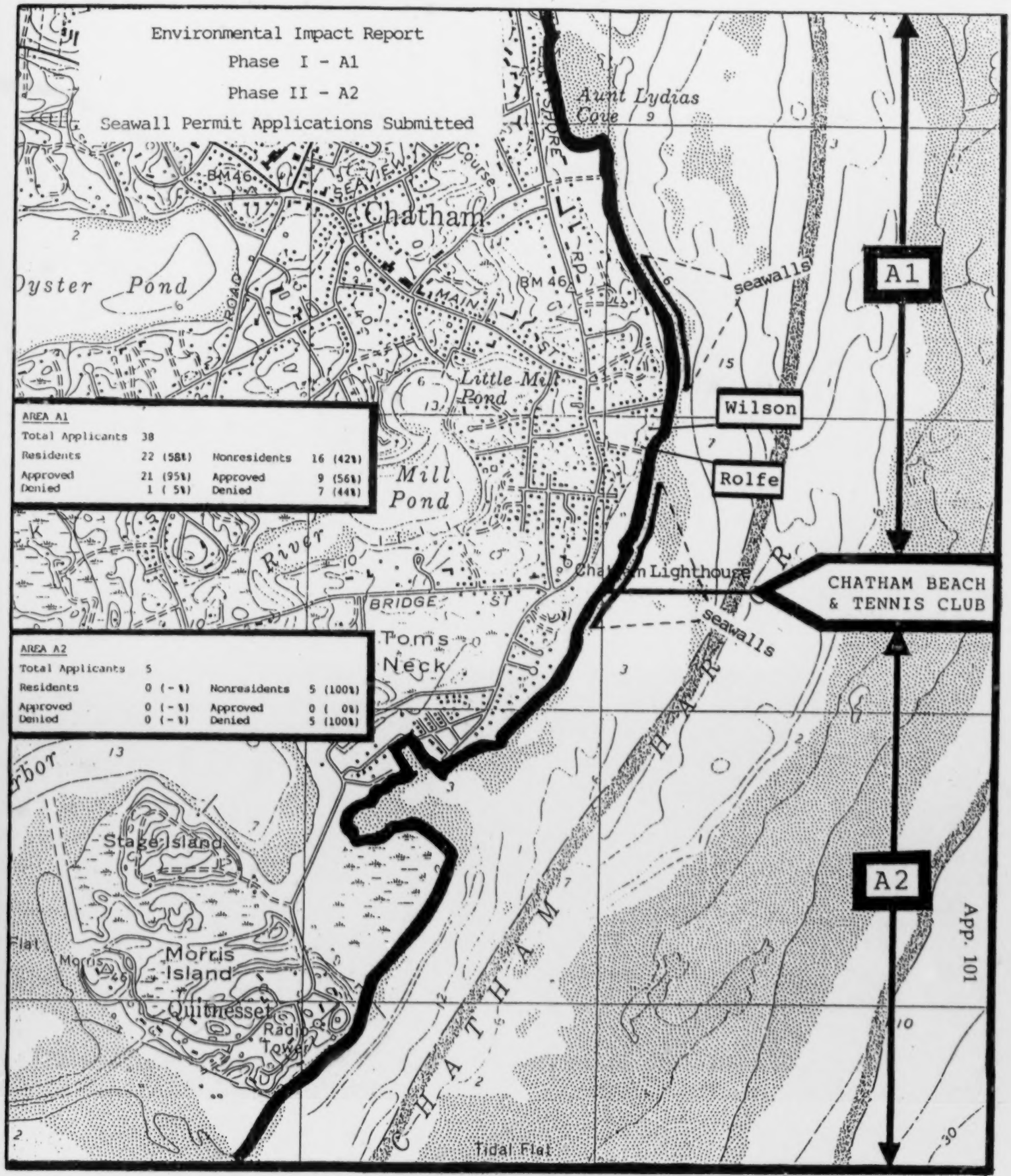
Phase I - A1

Phase II - A2

Seawall Permit Applications Submitted

AREA A1			
Total Applicants	38		
Residents	22 (58%)	Nonresidents	16 (42%)
Approved	21 (95%)	Approved	9 (56%)
Denied	1 (5%)	Denied	7 (44%)

AREA A2			
Total Applicants	5		
Residents	0 (- %)	Nonresidents	5 (100%)
Approved	0 (- %)	Approved	0 (0%)
Denied	0 (- %)	Denied	5 (100%)



SCALE

1 ½ 0 1 MILE

1000 0 1000 2000 3000 4000 5000 6000 7000 FEET

1 .5 0 1 KILOMETRE

DISCRIMINATION IN SEAWALL PERMITS CHATHAM, MASSACHUSETTS

Updated to February 15, 1995

Data conformed to

Environmental Impact Report

Nicholas B. Soutter
Suite 208
One Washington Street
Wellesley, MA 02181
(617) 237-6300

Environmental Impact Report [EIR]

Who had to file

In 1988, regulators ordered an EIR describing every seawall in place or planned in area "A" (from the Fish Pier to Morris Island) (p.1). Work on the EIR was to be started ten days after work began on the first seawall.

Twenty-two residents and twenty-one nonresidents applied for seawalls.

The only resident denied a seawall wanted to protect a tennis court. Twelve nonresident applications, all to protect houses, were denied. Six of these houses were later lost.

No residents' houses were damaged in the flood. Residents were allowed seawalls to protect their golf greens, empty lots and tennis courts.

All five nonresidents who asked for hearings on their permit denials were told they would have to do the EIR first.

The last of the seawalls (70% resident owned) was completed in 1990. Work began on the EIR two years later.

Sandbags

The typical seawall is built 20 feet above sea level, 12 feet below, will last 100 years and costs $1,000 per linear foot.

Nonresidents denied seawalls are forced to use sandbags.

The sandbags are 5 feet tall, have a design life of 3 years and cost $700 per linear foot.

The nonresident family next to a resident with a seawall protecting a tennis court had to nourish (replace) their beach at a cost of $30,000 before they were allowed to put in $104,000 worth of sandbags. They also had to advance the $30,000 for the homeowners' share of the EIR.

Their house suffered $100,000 of flood damage while they waited five years for a permit hearing that is ongoing and has cost them $60,000 so far.

Phased EIR

Seawalls are prohibited in areas where there is "any natural ridge, hill or mound of sand". All of area "A" is such an area (p.3).

In 1992, regulators divided the EIR into two Phases. Phase I covers area A1. Phase II covers area A2 [p.2].

A1 is 70% residents (adjusted for nonresidents' houses lost), A2 is 84% nonresidents.

Scientists working on Phase I were ordered not to analyze the environmental impact of A1's seawalls, particularly the amount sand they kept from flowing to A2.

In A2, scientists had to report the environmental impact of every seawall proposed or in place.

Test borings would show that almost all of the 30 seawalls in A1 are on sand and that there is more sand in A1 than in A2 (p.3).

In A2, there have been five applications for seawall permits. All were by nonresidents and all were denied, including three on Morris Island, one of the few sections of area "A" that has no sand.

Notes

1) All data is from seawall permit applications ("Notices of Intent") for area "A" filed in Chatham between 1987 and 1992 and is classified by owner, not number of parcels.

2) Suggestions, comments and criticisms of this study are welcome and should be addressed to:

Nicholas B. Soutter
Suite 208
One Washington Street
Wellesley, MA 02181
617-237-6300

Mr. Soutter is the author of this document and is a lawyer representing homeowners in area A in litigation against the Commonwealth of Massachusetts.

August 10, 1992

Secretary Susan Tierney
Executive Office, Environmental Affairs
100 Cambridge Street, 20th Floor
Boston, MA 02202

Dear Secretary Tierney:

The undersigned represents Debra and Steve Rolfe, Bernice and Lewis Hicks, Evelyn and Alfred Nelson and Joan Wilson.

Please be advised that we intend to sue the State of Massachusetts and the Town of Chatham in Federal Court for violation of the Civil Rights of non-resident property owners.

There are 29 coastal properties in Chatham from Watch Hill to Dune Drive. Ten are owned by Chatham residents while 19 are owned by non-residents. Sixteen of the non-residents are citizens of other states.

Since 1987, 15 seawalls have been allowed in this area. Ten of these belong to residents, five to non-residents.

All Chatham residents have seawalls. Only 27% of non-residents have seawalls.

All of the remaining 14 properties are without seawalls. They are all owned by non-residents.

The houses on six of these properties have been destroyed by the ocean.

The surviving 8 houses were flooded in the October 1991 storm and are worthless.

These 8 properties have been valued for tax purposes at 4.0 million dollars, 55% of their December 31, 1987 value. This is a reduction of only 45%.

The 5 properties owned by non-residents with seawalls are valued at 2.6 million dollars or 79% of December 31, 1987 value. This is a reduction of 21%.

The 10 resident properties with seawalls are assessed at 5.1 million dollars. This is 58% of the December 31, 1987 value or a reduction of 42%, almost twice the reduction given to non-residents with seawalls.

Prior to 1987, the Chatham Beach and Tennis Club was valued at 2.3 million dollars, while the Nelsons next door were valued at 1.9 million.

Since then, the Nelson property has been denied a seawall, has lost 150 feet of beach, and now sits 19 feet from the ocean. The home is worthless. The Town presently assesses the property at 1 million dollars, a reduction of only 47%.

On the other hand, the Beach and Tennis club now has a seawall and is assessed at $975,000 or 42% of December 31, 1987 value. This is a reduction of 58%.

Massachusetts has refused to hear any appeals on Chatham seawall denials. There have been at least 8 such denials, all against non-residents.

The State says it will not change this policy until an Environmental Impact Report is filed for the 2 miles from Watch Hill to Morris Island.

Because Chatham didn't have the money, the Nelsons advanced it $30,000 to help pay for the Report. The

Nelsons were promised that the area covered would include the area to the southern end of the Hicks property on Dune Drive.

The Town took the Nelson's money, then announced that neither the Nelsons nor the owners of properties to their south would be included in the EIR.

Instead, the EIR will cover that section of the coast already protected by seawalls, two-thirds owned by residents.

The study area is now 25% of the area mandated by the State. It stops just 25 feet short of the Nelsons. It serves the needs of all of the residents while doing nothing for the non-residents facing imminent destruction.

We estimate damages at $4,000,000 of property, excess taxes of $100,000 and $30,000 for the EIR.

Sincerely,

/s/ Nicholas B. Soutter
Nicholas B. Soutter

cc: Daniel S. Greenbaum
Madelyn Horris, Esq.
Bruce Gilmore, Esq.
Selectmen, Town of Chatham

[p. 1] VOL. I
PP. 1-52

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. Superior Court
C.A. No. 89-881

****

JOAN WILSON, ET AL,

Plaintiffs

vs.

COMMONWEALTH OF
MASSACHUSETTS, ET AL

Defendants

****

DEPOSITION OF GRAHAM SHERWOOD GIESE, taken on behalf of the Plaintiff, pursuant to the Massachusetts Rules of Civil Procedure, before Maryellen Coughlin, CSR/RPR, a Notary Public within and for the Commonwealth of Massachusetts, at the Law Offices of Nicholas B. Soutter, One Washington Street, Wellesley, Massachusetts, on Wednesday, July 12, 1994, commencing at 2:10 p.m.

HAROLD A. GABRIEL, CSR
15 Van Wart Path
Newton Centre, Mass. 02159
(617) 969-4791
FAX (617) 964-1321

* * *

[p. 19] anybody to your knowledge ever studied the number of seawalls that there are on the Cape, that there were on Cape Cod in 1978?

A No, I don't think anybody has, that should be done.

Q Do you think anybody has studied the number of seawalls on the Cape as of the moment, present date, July of 1994?

A I don't know that they have.

Q It is just your knowledge, sir.

A I don't know they have, excuse me.

(Discussion off the record.)

Q Have you or anybody that you know of done a study as to how many seawalls might eventually be licensed under the exception for seawalls on bank where there are pre1978 houses?

A I don't know of it. I haven't. I have not.

Q Would you agree that that would be a useful number to have?

A I think it would.

Q Could we agree that if you put a seawall on bank that that's going to deny the sand in that bank to the formation of future dunes and [p. 20] beaches?

A Yes, it would.

Q Could we agree, sir, that if Mrs. Wilson's neighbors to her immediate north got seawalls that those might deny her dune sand?

A Yes, yes.

Q And can we agree that that dune sand would have in fact, might have in fact helped protect her property?

A It would I think very likely reduce the rate of erosion.

Q Did you form any opinion, sir, in October, November – well, whenever you were on the Wilson property, as to what the rate of erosion was on that property at that time?

A Yes. Let's see, I did. I made a measurement in November, and Ron gave me some measurements that he had made or told me of what an earlier distance to the scarp had been. I don't know that I really came up with an erosion rate until December of that year, 1987, because I did measure it in November, and I think I measured it again in December. I'm not sure of the dates, but I did get some ideas of the

* * *

Discrimination in Seawall Permits
Chatham, Mass.

REVISED TO MARCH 1993

N. Soutter
One Washington St.
Wellesley, MA 02181
617-237-6300

* * *

Methods of Discrimination

I. Conditions [p.14,15]

Nonresident permits always have expensive conditions attached.

These add an average oft $44,000 to nonresident seawall costs and $13,000 for residents.

The average seawall in the Flood Area costs $150,000. Nonresident conditions add 30% to that while resident conditions add 9%.

The 6 coastal houses lost in Chatham so far were nonresident properties whose permit conditions averaged over $70,000 apiece, 46% of the cost of the seawall.

II. Seawalls that Benefit Others (p.17)

Eighty-six percent of the nonresident permits require a benefit for a resident neighbor while fourteen percent of resident permits have this requirement. All beneficiaries are residents.

The 6 coastal houses lost so far were ordered to build a seawall for Chatham at a cost of $15,000 apiece. After

the houses were lost this condition was waived for residents in the same area.

III. Walls on Dune [p.13+18]

The eight seawall permit denials in the flood area are all nonresidents denied because they are on dune. Three other nonresidents in the same area have not applied.

Three of the six coastal houses lost were denied seawalls because they were on dune. All were nonresidents.

No resident in a dune area has ever been denied a seawall. More than half the seawalls built in the flood area are on dune and more than half of those are resident owned.

Nonresidents have been permitted to build seawalls in dune areas where the seawall would cover the flank of a resident seawall [map p.19].

The Town of Chatham Zoning By-law prohibits seawalls within 100 feet of a dune or beach. Under this definition, all walls in this study are on dune.

IV. Appeals

Nobody is allowed to apply for a seawall permit unless they are in imminent danger of destruction. Time is of the essence.

Only nonresidents are denied seawalls. Therefore, only nonresidents appeal.

Appellants are told by the State they must file an Environmental Impact Report before they can get a hearing.

In 5 years of flooding, more than 43 walls have been built without such a report. Estimated cost of the report is over $100,000. As of January 1, 1993, no EIR has been filed for any seawall project anywhere in Chatham.

When weeks matter, an appeal costing $100,000 and taking more than 5 years is no appeal at all.

Compare this with a building permit denial anywhere in Massachusetts. The appeal is heard by the Superior Court in less than a year.

V. Taxes [p.5,6]

Six nonresident properties have been lost since 1988. Eleven other nonresident properties are almost lost and ineligible for seawall permits.

The assessed value for these 17 properties in 1988 was 6 million dollars. In 1992 it was 7.4 million dollars, an increase of 20%. Average assessed value per property is $350,000.

Fair market value for these properties is $10,000 each for the 6 flooded properties and $100,000 each for 10 of the almost flooded with the 11th valued at $57,000.

Total fair market value of flooded and near flooded properties is 1.1 million dollars, an average of $61,000.

Nonresident flooded or almost flooded properties are assessed at 6.7 times their fair market value.

Nine Nonresident properties with seawalls had their assessments increase 115% between 1988 and 1992.

Twenty Resident properties with seawalls had their assessments increase 72% between 1988 and 1992.

The increase in assessments for flood area properties with seawalls was 1.6 times greater for nonresidents than residents.

* * *

(3) Illegal Seawalls

Chatham Beach and Tennis Club: Applied once, denied because on dune. Applied second time, allowed by Conservation Commission and State. Application says property is on dune. Structure protected is a tennis court. Club is private

Durham: house built after 1978. Sandbags approved.

Chatham Conservation Foundation: Seawall for empty lot.

17th Hole, Eastward Ho! Golf Course: No information from Conservation Commission. Audubon Society says seawall to protect golf course.
Club is private

Anonymous Resident on dune north of Fish Pier has wall required to be built by nonresident on bank.

Anonymous Nonresident house built after 1978 allowed to build seawall.

Nonresident	1
Resident	6

(4) Illegal seawalls including those on dune* (double counts eliminated).

Nonresident	7
Resident	11
Total	18
Illegal walls as % total 18/43	42%*

* * *

---

* Number is understated.

No analysis has been made of walls built on dune north of Fish Pier.

Only flagrant illegalities are reported here.

Under Chatham By-Law no seawalls may be built within 100 feet of a dune or beach. This means every wall in Chatham is on dune.

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
One Winter Street, Boston 02108
Office of General Counsel, Tel. 292-5568

(logo)

DANIEL S. GREENBAUM
Commissioner

WILLARD R. POPE
General Counsel

June 29, 1988

Nicholas B. Soutter, Esquire
One Washington Street
Wellesley, Massachusetts 02181

RE: DEQE Hearing Docket #88-94. DEQE File #10-653 (Butler/Roberts)
DEQE Hearing Docket #88-95, DEQE File #10-654 (Wilson)
DEQE Hearing Docket #88-96. DEQE File #10-655 (Galanti)
DEQE Hearing Docket #88-97, DEQE File #10-658 (Rolfe)

REPORT OF PRE-HEARING CONFERENCE

A pre-hearing conference was held on the above-referenced cases in the Department's Boston Office on June 14, 1988. The parties to this proceeding are: the Petitioners, Pam Butler Roberts (88-94), David Wilson (88-95), Paul Galanti (88-96), and Ted Rolfe (88-97), all represented by Nicholas B. Soutter, Esquire; and the Department staff James Mahala, represented by Matthew

Watsky, Deputy General Counsel. The Chatham Conservation Commission was not present at the pre-hearing conference and has not indicated its intention in these proceedings. If the commission intends to remain a party to these proceedings it should file a notice to that effect within two weeks of this report.

Separate Notices of Intent were filed for each of these cases with the Chatham Conservation Commission on January 19, 1988. After closing the hearing on February 4, 1988, the commission issued an Order of Conditions for each case on February 5, 1988. The Department appealed on its own initiative on February 17, 1988, taking jurisdiction over these cases. After conducting several site inspections and completing its review, the Department issued Superseding Orders of Conditions, denying the proposed work, on March 4, 1988.

Mr. Soutter, on behalf of each of the Petitioners, filed a Notice of Claim for Adjudicatory Hearing (appeal) on March 19, 1988, and amended each appeal on April 26, 1988, to include a request for a variance. The parties agree to consolidate these proceedings pursuant to 310 CMR 1.01(7)(h) and hold a single Adjudicatory Hearing for these cases together.

The Parties agree to submit pre-filed direct testimony. pursuant to 310 CMR 1.01(8)(f) on the following issues.

1. Could the eroding land-forms, where the revetment is proposed, ever have been classified as Coastal Dunes under 310 CMR 10.28?

2. Is the land-form now remaining, including that on which the Wilson house sits, a Coastal Dune as defined in 310 CMR 10.28?

3. Was the land form formerly, and is it now significant to flood control and storm damage prevention?

4. May the Proposed coastal engineering structure be built if the land-form is defined as an eroding Coastal Bank, under 310 CMR 10.30, rather than as a Coastal Dune? The parties stipulate to the fact that, of the properties in question, buildings currently exist only on the Wilson Property. The house on the Galanti property was destroyed prior to the filing of these Notices of Intent. The Rolfe house has been moved onto a portion of the Wilson Property, behind the Wilson house. The Lear Property for which Butler/Roberts is the applicant, has had no building on it at any time relevant to this proceeding.

5. All issues relating to whether the project qualifies for a variance, including:

    a) Whether reasonable conditions or alternatives exist that would allow the project to proceed in compliance with the regulations. A question not specifically raised at the pre-hearing conference, but which comes to mind now, is whether the Hearing Officer may consider alternatives that existed either at the time the Notice of Intent was filed, or when the problems at the site became evident.

    b) Whether mitigating measures are Proposed that will allow the project to be

conditioned so as to Protect the interests of the Act.

c) Whether the variance is necessary to avoid an unconstitutional taking.

An addittional [sic] issue Mr. Soutter wishes to raise is the applicability of the regulations to this specific site, which he frames in two parts.

1 A challenge to the underlying science of the regulations.

2 A constitutional challenge alleging that the regulations fail to provide due process.

At the time of the pre-hearing conference I was uncertain whether such an issue could be raised in the adjudicatory hearing process. After further consideration. I have concluded that the adjudicatory hearing is not an appropriate forum to challenge the underlying science of the regulations. G.L. c. 30A establishes distinct procedures for regulatory and adjudicatory proceedings before an agency. A facial challenge to the regulations, including a challenge to the "underlying science" of the regulations may only be brought in a regulatory proceeding under G.L c. 30A, § 7 rather than in an adjudicatory proceeding under G.L. c. 30A, § 10. See, e.g., *Grocery Manufacturers of America, Inc., v. Department of Public Health,* 379 Mass 70, 393 N.E. 2d 881 (1979); *Cambridge Electric Light Co. v. Department of Public Utilities,* 295 N.E. 2d 876 (1973).

SCHEDULE

The parties agreed to a schedule for submittal of prefiled direct testimony on all of the above issues. Under the wetlands regulations, 310 CMR 10.03(1) and (2) the

Petitioners in this proceeding carry both the burden of going forward and the burden of proof on all issues. The Petitioners' testimony will therefore be filed first and the Department will then respond. The Department agreed to file its testimony within three weeks of the filing of Petitioners' testimony. The Petitioners' requested one and one-half months (1½) from the date of the pre-hearing conference to file testimony. The Petitioners' testimony, therefore, will be due on or before August 1, 1988. THe Department has agreed to file three weeks afterwards on August 22, 1988.

Mr. Soutter identified five witnesses who will be filing pre-filed written direct testimony on behalf of the Petitioners. These witnesses will be:

1. Professor Connor, who will address breakwaters generally, dune formations, and this site;

2. Robert E. Weaver, same;

3. Ronald Wilson, an engineer and one of the parties in this proceeding (Docket #88-95). will also testify, generally regarding breakwaters and this site' and also will testify regarding alternatives to the proposed action;

4. John Milliman, a marine geologist, will testify regarding dune formation; and

5. Paul O'Leary, a real estate broker, will give testimony on the taking question.

The Department's witnesses will be James Mahala, a coastal geologist on the Department staff; and Jeff Benoir, who is also a coastal geologist and who works in the

Coastal Zone Management Office. Both Mahala and Benoit will testify on all technical and regulatory issues in this case, including identification of the land-form, assessing its significance, reviewing the proposed work and alternatives. Elizabeth Kouloharas, Acting Section Chief for the Regional Wetlands office may also testify regarding technical and procedural issues and an as yet unknown witness may testify regarding taking issues. I agreed to notify Mr. Soutter as soon as possible of the identify of this additional witness.

I noted that the proposed work is subject to MEPA and the Department is obligated to ensure that MEPA compliance be effected as early in the permitting process as possible, and in any event not to issue a permit prior to completion of the MEPA process. Mr. Soutter stated that an ENF would be filed immediately.

Finally, I noted that Mr. Soutter had filed discovery requests on May 4, 1988, to which the Department filed objections. Although no Hearing Officer has ruled on these requests and motions yet, under the Standard Rules, 310 CMR 1.01(8), formal discovery is available after a Petitioner has attempted to obtain information through voluntary means. Mr. Soutter and I agreed to discuss the discovery requests informally over the phone at a later date to work towords [sic] providing access to the information voluntarily.

Corrections or additions to this Report should be filed within two weeks of its date. All papers filed with the Agency must be copied to all other Parties to this proceeding. (310 CMR 1.01(5)(f)).

/s/ Matthew Watsky
Matthew Watsky
Deputy General Counsel

cc: James Mahala
Jeff Benoit
Madeline Morris
Docket Clerk

MW/jm
0360K

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS SUPERIOR COURT
C.A. NO. 89-881

JOAN WILSON, RONALD WILSON, STEPHEN ROLFE, FREDERICK ROLFE, AND ELAINE ROLFE,
Plaintiffs

v.

COMMONWEALTH OF MASSACHUSETTS AND TOWN OF CHATHAM
Defendants

AMENDED COMPLAINT

Parties

The original Complaint is incorporated as if set forth herein. Parties are the same as in the original Complaint with the Town of Chatham as an additional defendant.

Additional Facts

42. Flooding is the movement of water onto land. Erosion is the destruction of land by flooding.

43. A beach is an accumulation of sand from coastal erosion. Beach sand is rounded and bleached by the ocean. It is also called dune sand.

44. All beach (dune) sand was once coastal bank sand. Coastal bank is the mixture of clay and sand that forms the coast behind beaches.

45. A dune area is defined by defendants as any ridge, hill or mound of either dune sand deposited onshore by wave or wind or any fill placed by humans.

46. In effect, a dune area is any ridge, hill or mound of fill that is not coastal bank.

47. Equilibrium is a balance between opposite forces.

48. A beach is in equilibrium when the sand it receives is equal to the sand it loses.

49. Waves move sand. Erosion occurs when waves take more sand from a segment of coast or beach than they bring to it.

50. Longshore transport is the transportation of sand by waves along the coast. Longshore transport is also called coastal sand flow or sand flow.

51. Onshore-offshore transport occurs when waves move sand on and offshore.

52. Wind also moves sand, though in much smaller quantities than waves.

53. Beaches rollover when waves and wind move them landward. Beaches tend to maintain their form when they rollover.

54. Coastlines retreat (erode) when they are attacked by wind and waves. The contents of the landform falls into the water. Clay is dissolved and sand is moved by wind and waves.

55. Defendants' regulations say that equilibrium is the natural state of beaches.

56. They also say that beach erosion one place provides sand to help maintain the equilibrium of beaches downstream.

57. The regulations ban seawalls because they stop erosion of the landform behind them and this denies sand to downstream beaches.

58. The regulations permit seawalls to be built on coastal bank to protect a pre-1978 structure that is in danger of flooding.

59. Seawalls are banned, then, where there is no immediate danger of flooding, where there is no pre-1978 structure and where there is any ridge, hill or mound that is not coastal bank.

60. No explanation is given in the regulations for the classifications described in paragraphs 58 and 59. They are generally referred to as the dune-bank distinction.

61. The regulations say that beaches provide a natural buffer between waves and the shore by forcing waves to break and absorbing the resulting energy.

62. Waves break in depths equal to 125% of wave height. A ten foot wave breaks in about 12.5 feet of water.

63. Beaches drop 1 to 3 feet for every 100 feet they extend beyond the low tide mark. A 10 foot wave will therefore break between 1,250 and 3,750 feet offshore where there is a beach.

64. The stated purpose of the seawall ban is to maximize the size of beaches thus improving their performance as buffers against flooding and storm damage

COUNT SEVEN: WETLANDS REGULATIONS ARE INVALID ON THEIR FACE

65. Plaintiffs restate the allegations in the Original Complaint and paragraphs 42 through 64 of this Complaint as if set forth in this Count.

66. This Count is brought pursuant to the United States Constitution, Article 4, Section 2, Clause 1 and the Fifth and Fourteenth Amendments thereto, and the Constitution of the Commonwealth of Massachusetts, Part. 1, Articles 1, 10, and 11.

General Theory

67. Defendants say that beaches require ongoing coastal erosion to survive. Seawalls are banned because they stop this erosion.

68. Defendants say beaches control erosion by absorbing wave energy.

69. Defendants do not compare the erosion beaches require to survive to the erosion beaches prevent.

70. Absent this comparison there is no way to judge the assertion that beaches control erosion, particularly when compared to seawalls.

71. Defendants say that as a practical matter erosion does not exist where there are no man-made structures and that flooding and storm damage are a golden opportunity to destroy coastal development.

72. Defendants' regulation says it is intended to control flooding and prevent storm damage.

73. At the same time it mandates an erosion based system and bans an erosion stopping system without explanation. It is inconsistent on its face.

Specific Theories: Beaches as Buffers

74. A single 10 foot wave will break 1,250-3,750 feet offshore. A series of such waves will advance landward as water from each wave accumulates, increasing water depths.

75. Low atmospheric pressure will also raise water levels.

76. The combined effect of successive waves and low atmospheric pressure create what is called a storm surge.

77. On Cape Cod there is an average of one surge a year that raises sea levels on the coast by 2.9 feet.

78. In 1944 a surge of 11 feet was recorded at Chatham.

79. Tides also raise water levels from an average of 6 feet to an extreme of 12 feet when the moon is full or near the earth.

80. Combined storm surge and tidal increases raise sea level anywhere from 8.9 feet to 15.9 feet.

81. Ten foot waves can break on the coast under these circumstances and will cut through 100 feet of sand, 10 feet high, in about 10 hours.

82. The regulatory description of beaches as buffers refers to a single wave in fair weather and does not describe the loss of buffer functions during a storm.

Specific Theories: Beach Equilibrium

83. The beach described in the regulations is in equilibrium. It receives as much sand as it loses.

84. The testimony on which defendants' regulations are based, however, says perpetual coastal erosion is required to maintain beaches and that all beaches are completely recycled over a 75 year period.

85. In sworn testimony, defendants have said 90% of beaches erode.

86. There are 18,888 acres of barrier beaches in Massachusetts. These beaches need 250 acres a year of new coastal erosion to survive (18,888 acres divided by 75 years).

87. Beach equilibrium exists only in defendants' regulations.

Specific Theories: Littoral Drift (Coastal Sand Flow)

88. The regulations assume that all eroded sand is carried downstream by waves.

89. Testimony in support of the regulations says that sand may move downstream.

90. Defendants' experts says no one knows exactly where the sand goes.

91. It is clear from defendant's erosion numbers, however, that 90% of eroded sand ends up in deep water.

92. In the 6,000 years since the last ice age, the Outer Cape (Provincetown to the southern end of Monomoy) has lost 7 billion cubic yards of sand.

93. One billion cubic yards of this sand has formed the Provincelands (from Provincetown to Pilgrim Lake) and the Nauset Barrier Beach (Eastham to the southern end of Monomoy Island).

94. The other 6 billion cubic yards have been lost in deep water off the Cape. Eighty-six percent of all eroded sand has been permanently lost in deep water.

95. Present sand flows are 350,000 cubic yards a year north from Highland Light to Provincetown and 900,000 cubic yards south from Highland Light to Monomoy.

96. There is a gain of 150,000 cubic yards a year in the Provincelands.

97. Net sand lost to deepwater is presently 89% of total erosion.

98. The seawall ban is intended to maximize upstream erosion and coastal sand flow in order to move sand downstream where it is lost forever.

99. The result is perpetual flooding and storm damage.

Specific Theories: Seawalls Cause Erosion

100. Seawalls stop erosion. Defendants say this denies sand to downstream beaches and causes them to erode.

101. The only sand a seawall denies to downstream beaches is the sand it keeps from eroding. A seawall cannot "cause" more erosion than it prevents.

102. When 90% of beaches are eroding, a seawall is preventing the loss of 90% of sand behind it and "causing" downstream erosion of 10%. Beaches, on the other hand, are "causing" 90% of the coast to erode.

103. It would be a lot simpler to admit that seawalls stop erosion and beaches don't.

Remedies: No Time Standards

104. Remedies available under the regulations are inadequate on their face.

105. A property must be in danger of destruction before remedies become available.

106. The regulations do not set deadlines for appeals.

107. The seawall applicant must be at risk while problem resolution is left to the whim of the regulators.

Remedies: Presumption of Significance

108. The regulations say that all sand flows to downstream beaches, all of which are in equilibrium and

all of which depend on sand from the seawall applicant's lot. These assumptions cannot be questioned.

109. The only issue on appeal is the amount of fill on the applicant's lot that is not original coastal bank, and the standard is "any ridge, hill or mound" of sand.

110. An applicant cannot argue that his seawall will contol [sic] flooding and prevent storm damage.

111. Defendants will not discuss the individual merits of a seawall, even where it benefits the public.

112. It is irrelevant, for instance, that a seawall will protect a wetlands.

113. There are 660 beaches with wetlands behind them in Massachusetts.

114. If applicants on these beaches are denied seawalls, their beaches will either rollover and choke the wetland or will break and the wetland will be destroyed by flooding.

115. The EPA estimates that 30% to 80% of the wetlands behind these beaches will be destroyed by flooding in the next 100 years.

116. The regulations do not allow applicants to raise any issue related to flood control, storm damage prevention or wetlands protection, no matter how important.

Known Fact Ignored: Sea Level Rise

117. World sea levels are increasing an average of 6 inches every 100 years.

118. The Massachusetts coast sinks 6 inches every 100 years, making the effective rate of sea level rise here one foot every 100 years.

119. On average, the ocean will move 300 feet inland for every 1 foot of sea level rise.

120. These facts were known when defendants enacted their regulations.

121. The regulations were intended to assure coastal flooding of 3 feet a year in areas without seawalls.

122. Since enactment, there is evidence that sea level rise has accelerated.

123. Present estimates are that sea levels will rise between 1 to 3 feet over the next 50 years.

124. Annual flooding/erosion from this would be 6 to 18 feet a year or destruction of 600 to 1,800 feet inland over the next 100 years.

125. At this rate, most homes on the water will be in the ocean in a decade.

126. The regulatory fiction that 3 feet a year of coastal erosion means beaches are in equilibrium is unlikely. At 6 to 18 feet a year, it is absurd.

127. Defendants' theory of beach equilibrium gives the impression that erosion, flooding and storm damage are self-curing problems.

128. Among the duped are many administrators who think eroded sand produces new coastline to replace the old.

129. Defendants' failure to even mention sea level rise or relax its regulatory assumptions about beach equilibrium is consistent with their view that storm damage and flooding are desirable.

Known Fact Partially Ignored: Seawalls Widely Used

130. Seawalls built by the Romans in the time of Christ are still standing.

131. Seawalls built by the Dutch have been used to take an area the size of Massachusetts from the sea over the last 600 years.

132. The seawall in Galveston, Texas built immediately after a flood killed 6,000 people in 1900 is still working.

133. Forty-eight of the 50 largest cities in the United States are protected by seawalls.

134. Four hundred fifty of the 1,500 miles of Massachusetts' coast are already covered by seawalls, 110 miles in Boston alone.

135. Defendants do not say that these walls deny sand to downstream beaches or that their removal would stop erosion.

136. Defendants allow new seawalls to protect pre-1978 structures on coastal bank without explaining how much erosion they will cause.

137. Defendants' regulations are inconsistent on their face. Seawalls either cause erosion and should be banned or they do not cause erosion and should be allowed.

WHEREFORE, plaintiffs pray that this Court enter an order striking defendants' regulations prohibiting seawalls on coastal dunes, and award plaintiffs damages including but not limited to money damages for the lost value of their homes and property, reimbursement for engineering and legal fees, costs and attorneys fees, and such other relief as this Court finds appropriate.

* * *

151. Average value for a front line house in 1987 was $750,000, for a house in the second line, $500,000 and a house in the third line $300,000.

152. These properties pay over $550,000 a year in taxes. Their assessed value is over $70,000,000.

Arbitrary Denial of Seawalls Permits

153. Of the 46 properties in the flood area, 29 have seawalls, 8 have been flooded and have been denied seawall permits, 3 have been flooded and not applied for permits and 6 have been destroyed by flooding.

154. All 20 Chatham residents in the area have seawalls. Nine out of 26 nonresidents (35%) have them.

155. All the 11 flooded properties and the 6 destroyed properties were owned by nonresidents.

156. All of the 10 appeals of permit denials taken since 1988 were by nonresidents. All of these appeals have been pending for 3 years or more.

157. Defendants have never given a hearing on a seawall permit denial in Chatham.

158. Seawalls are a common safety device. Defendants have denied them to some and allowed them to others while refusing to give an appeals hearing to anybody.

Presumption of Significance

159. Measured from the coast to 100 feet inland there was no more than 5,000 cubic yards of sand on each of plaintiffs' properties, an average of 2,500 cubic yards per lot.

160. Plaintiffs had a recognized expert in the field of coastal geology who said this sand was not significant to flood control and was not the same as the ridge, hill or mound of sand described in the regulation.

161. There were at least 20,000 cubic yards of sand in the area where plaintiffs' six neighbors obtained permits, an average of 3,000 cubic yards per lot.

162. There are between 150,000 and 200,000 cubic yards of sand behind the 29 seawalls defendants eventually allowed in the flood area, an average of 5,000 to 6,000 cubic yards of sand per lot.

163. Over 2,000,000 cubic yards of sand had eroded in Chatham between January 1987 when the barrier beach broke and August of 1988 when defendants refused to hear plaintiffs' appeals.

164. The barrier beach contained 15,000,000 cubic yards of sand at the time it broke. This sand had not stopped flooding.

165. Plaintiffs' 5,000 cubic yards were found by defendants to be significant to flood control and storm damage prevention.

166. The regulations prohibit seawalls on lots with any ridge, hill or mound of dune sand.

167. Almost all the 29 seawalls permitted by defendants are illegal under this definition.

168. After plaintiffs' houses were lost, defendants redefined significance in Chatham to mean more than 50% dune sand in a property.

169. This definition contradicted plaintiffs' theory of supplying sand to downstream beaches.

170. The relative sand content of a property does not suggest the actual volume of sand present or how much of that sand will reach downstream beaches.

171. Plaintiffs would have qualified for seawalls under the new definitiion [sic].

172. Defendants ignored the new definition even as they had ignored the old. Few of the 29 seawalls built are on lots that would meet the less than 50% dune sand test.

173. The 29 seawalls are utterly inconsistent with defendants' theory of maximizing sand to downstream beaches.

174. Defendants were wrong to require plaintiffs to sacrifice their houses while allowing 29 others to keep their houses and their sand.

175. The barrier beach in Chatham has been completely intact for only 20 of the last 150 years.

176. Where the beach has not protected the shore, flooding has penetrated 250 to 1,400 feet inland.

* * *

202. Eight permit applicants subsequent to Plaintiffs have been denied appeals or variance hearings because there was no EIR. All have been flooded. All are nonresidents of Chatham.

203. Twenty-nine seawalls have been built without an EIR, 20 of these owned by residents and 9 by nonresidents. In the flood area there are 46 properties, 20 owned by residents and 26 by nonresidents.

204. In June of 1992, one of the 8 nonresidents provided the funds for the homeowners' share of the EIR.

205. Defendants took the money and, without notice, divided the EIR into 2 phases.

206. Phase I covers the area where the 29 seawalls have been built. Defendants have ordered that there be no discussion of the impact of these seawalls. This is illegal.

207. Phase II must fully discuss the impact of every seawall in place or proposed in the area.

208. The EIR requirement is meaningless as to residents and fatal for most nonresidents.

209. If the 29 seawalls in place do not deny sand to downstream beaches, then plaintiffs' seawalls wouldn't have denied sand to downstream beaches either.

210. If the 29 seawalls do deny sand to downstream beaches, the quantity is enormous compared to sand in plaintiffs' lots [150,000 cubic yards vs. 5,000 cubic yards].

211. Plaintiffs were in desperate need of a prompt appeals hearing.

212. Defendants used the EIR requirement to arbitrarily deny plaintiffs this hearing.

213. Defendants have since used the EIR requirement to deny hearings to 8 others, all nonresidents of Chatham.

214. Defendants are not interested in the environmental impact of seawalls or any kind of objective investigation of their regulatory theories.

215. All 8 of the permit applicants presently waiting for appeals hearings and their 3 nonapplicant neighbors are nonresidents.

216. All 11 are flooded.

* * *

339. In 1992, the Supreme Court ruled that, absent a showing of public nuisance, a state may not prohibit an ordinary land use so as to deny economic use of the land.

340. The fair market value of plaintiffs' properties in 1987 was over $1,000,000. Now, because of defendants arbitrary use of the seawall ban they have been destroyed.

341. Defendants have not changed their permitting procedures and have denied plaintiffs appeals hearings.

342. Defendants have illegaly [sic] blocked efforts to examine the impact of the seawalls they have permitted in Chatham.

343. Defendants have not read a recent and uncontradicted study saying seawalls do not deny sand to downstream beaches.

344. Defendants have not studied seawalls in place in Massachusetts to determine if they deny sand to downstream beaches.

345. Defendants have not studied the flood in Chatham to determine how it might be stopped.

346. Defendants' own scientific testimony in support of its regulation says that eroded sand *may* flow downstream.

347. Defendants' regulatory theory that sand will flow downstream was not justified when made and has been completely discredited since.

348. Defendants simply ignored the eventual loss of all eroded sand to deep water and did not quantify how far sand might travel in the meantime.

349. The 1868 U.S. Coast and Geodetic study concluded that breaching of the barrier beach caused extensive flooding on shore in the last century. Defendant ignored this study in 1978 and predicted that the next breach would not cause coastal flooding.

350. In 1987 defendants ignored the 1868 study and a more recent (1983) work concluding that erosion of up

to 9 feet a year would accompany a new breach. Defendants told homeowners that there would be no flooding behind the break.

* * *

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS SUPERIOR COURT
C.A. NO. 89-881

WILSON. ET AL.,
Plaintiffs

V.

COMMONWEALTH OF MASSACHUSETTS,
Defendant

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Now come the plaintiffs and move that Summary Judgment be entered for them because defendant cannot show at trial that plaintiffs' proposed seawalls would have been a nuisance.

For further grounds see Plaintiffs' Opposition to Commonwealth's Motion for Summary Judgment, Part V, p.8 dated October 14, 1994.

Respectfully submitted this 14th day of October, 1994.

JOAN WILSON, ET AL.
By their attorneys,

/s/ Nicholas B. Soutter
Nicholas B. Soutter
BBO #473740
Paul S. McGovern
BBO #549167
One Washington Street
Suite 208
Wellesley, MA 02181
(617)237-6300

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS SUPERIOR COURT
C.A. NO. 89-881

WILSON, ET AL.,
Plaintiffs

V.

COMMONWEALTH OF MASSACHUSETTS,
Defendant

PLAINTIFFS' OPPOSITION TO COMMONWEALTH'S MOTION FOR SUMMARY JUDGMENT

I. DELAY

In January of 1987 defendant inspected the breach in the Nauset Barrier Beach. In April of 1987 defendant advised the Town of Chatham on responses to onshore flooding [Ex.1].

Flooding in plaintiffs' area began in late September and the Selectmen were notified [Ex.2].

On November 19, 1987 the Conservation Commission declared an emergency in the Andrew Hardings Lane area [Ex.3]. A copy of this finding had to be sent to defendant 310 CMR 10.06(4) [Ex.4].

* * *

Defining high water is difficult. Exhibit 26 shows high water before January 1987 and high water in January of 1988 in plaintiffs' area.

If the high water marks were used as the defendant suggests, no seawalls could have been built anywhere in Chatham.

Defendants have permitted sixty-four seawalls in Chatham since 1987, thirty-four of these in the area from the Fish Pier to Morris Island (Ex.21).

V. LUCAS

At the time of remand of this case it was unclear whether *Lucas v. South Carolina* ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) applied [Ex.27].

It has since been established that seawalls licensed by the defendant since 1987, are common in Chatham [Ex.21].

Simultaneous with denying seawalls to plaintiffs, defendant allowed seawalls to six of their neighbors.

Defendant has denied a common land use to plaintiffs. The burden is on the defendant to show that plaintiffs land use would rise to the level of a nuisance at Common Law [Ex.27,p.145 of the Appendix].

On July 12, 1994 plaintiffs deposed the scientist responsible for the testimony used to support defendant's regulation.

His testimony was that the regulatory distinction between dune and bank was unsound and a device to Permit limited "grandfathering".

He also testified that the seawalls allowed by defendant to plaintiffs' neighbors were likely to harm plaintiffs [Ex.28].

Defendant has to explain how plaintiffs' seawalls would have been a nuisance while the walls permitted to the neighbors weren't.

Defendant's Answers to Interrogatories show that it does not intend to meet this burden.

Defendant should either supplement its Answers or Summary Judgment should be entered against it.

Respectfully submitted this 14th day of October, 1994.

JOAN WILSON, ET AL.
By their attorneys,

/s/ Nicholas B. Soutter
Nicholas B. Soutter
BBO #473740
Paul S. McGovern
BBO #549167
One Washington Street
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(617)237-6300

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
Southeast Region
Lakeville Hospital, Lakeville, Massachusetts 02347
947-1231, Ext. 680-684

[SEAL]
S. Russell Sylva
Commissioner
Gilbert T. Joly
Regional Environmental Engineer

February 17, 1988

E.I.T., Inc.
Box 631
73 Cranberry Highway
Sagamore, Massachusetts
02561

RE: CHATHAM –
Wetlands
File Nos. SE 10-652,
10-653 10-654,
10-655, and 10-656

ATTENTION: Robert E. Weaver

Gentlemen:

Please be advised that the Department of Environmental Quality Engineering, upon its own initiative, and in accordance with the General Laws, Chapter 131, Section 40, has appealed the Order of conditions issued by the Local Conservation Commission on the above-referenced files and that the Department will make a determination on whether the area on which the proposed work is to be done is significant to public or private water supply, to the groundwater supply, to flood control, to storm damage prevention, to prevention of pollution, to

protecting of land containing shellfish or to the protection of fisheries.

After making such determination, the Department of Environmental Quality Engineering will issue Superseding Orders of Conditions imposing such conditions as will contribute to the protection of the interests described herein.

Department personnel have conducted several inspections of the area for the purpose of providing technical assistance to the Chatham Conservation Commission and the property owners. The Department has determined as per 310 CMR 10.05(7)(i), that an additional inspection of the site is not necessary at this time. However, the Department would reconsider holding an on-site inspection if so requested by the applicants within five (5) days of receipt of this letter. Said request may be made directly by telephone.

Any additional information, documentation, data or comments concerning the above-referenced files, relevant to the Department's review and which should be taken into consideration before issuance of the Superseding Orders, should be submitted immediately. Please notify the Department by phone, within five (5) days of receipt of this letter whether additional information is to be submitted and if so when it will be forthcoming.

Please be advised that a review of the projects indicate that they exceed one or the other of the following wetland threshold(s) as found in 301 CMR 11.26(7)(a) of the Massachusetts Environmental Policy Act (MEPA)

2. The issuance of a superseding Order of conditions permitting any:

b. alternation of a primary dune (File Nos. SE 10-654, 10-655 and 10-656) or

d. new, expanded or reconstructed armouring of a coastal bank (File Nos. SE 10-652 and 10-653.)

Therefore, these projects are subject to review under MEPA, Mass. General Laws, Chapter 30, Sections 61-62H, and require the filing of Environmental Notification Forms (ENF) with the Secretary of Environmental Affairs. The Secretary must certify that the projects comply with MEPA before the Department can issue Superseding Orders of Conditions regulating the projects (re: 310 CMR 10.07.) The Department recommends, in this instance, that the project proponents contact Mr. Steve Davis, Director of the MEPA Unit, and request an Emergency approval of the Secretary as provided for in 301 CMR 11.11 – Emergency Actions. Mr. Davis may be reached by writing or calling the following:

Executive Office of Environmental Affairs
MEPA Unit
100 Cambridge Street
Boston, MA 02202

or

(617) 727-5830

In addition, please be advised that the Division of Wetlands and Waterways Regulation, Waterways Regulation Program, will require a Waterways License pursuant to General Laws, Chapter 91, and its regulations 310 CMR 9.0 If you have not already done so a completed Waterways License Application, for each project, should be submitted to the Division immediately. Said applications

and any questions concerning the Chapter 91 licensing process may be directed to:

Charles J. Natale, Jr.
Section Chief
Waterways Regulation Program
Department of Environmental Quality Engineering
One Winter Street, 8th Floor
Boston, MA 02108
Telephone Number (617) 292-5695

Any project involving the placement of fill in wetlands or involving any other work which may result in a discharge of material into waters or wetlands will necessitate a Water Quality Certification from the Mass. Division of Water Pollution Control. To obtain information contact:

Ms. Judy Perry
Division of Water Pollution Control
Department of Environmental Quality Engineering
One Winter Street, 7th Floor
Boston, Ma 02108
Telephone Number (617) 292-5655

Please be aware that the United States Army Corps of Engineers may also require application for a Department of the Army Permit. Write or call the Corps for additional information at the following address or number:

U.S. Department of the Army Corps of Engineers
New England Division Regulatory Branch
424 Trapelo Road
Waltham, MA 02254
Telephone Number 1-800-362-4367 (toll-free)

No work, as proposed in the Notices of Intent for the referenced files shall be undertaken until the Final Orders of conditions have been issued by the Department of Environmental Quality Engineering and all appeal periods have elapsed.

If you have any questions regarding this matter contact either James Mahala or myself at the above telephone number.

Very truly yours,

/s/ Elizabeth A. Kouloheras
Elizabeth A. Kouloheras,
Acting Chief Wetlands
Section

EAK/jt

CERTIFIED MAIL #P 676 087 835
RETURN RECEIPT REQUESTED

cc: Chatham Conservation Commission

Nicholas B. Soutter
Attorney at Law
One Washington Street
Wellesley, MA 02181

Ted Rolfe
22 Wesson Terrace
Northboro, MA 01532

Paul Galanti
126 Grove Street
Lodi, New Jersey 07644

David Wilson
43 Andrew Hardings Lane
Chatham, MA 02633

EXHIBIT THREE (3)

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss. SUPERIOR COURT
CIVIL ACTION
NO. 89-881

JOAN WILSON, RONALD WILSON, STEPHEN ROLFE, FREDERICK ROLFE and ELAINE ROLFE,

Plaintiffs,

v.

COMMONWEALTH OF MASSACHUSETTS,

Defendant.

AFFIDAVIT OF DAVID SHEPARDSON

I, David Shepardson do depose and say:

1. I am currently employed as a MEPA Analyst in the Massachusetts Environmental Policy Act, ("MEPA") Office of the Massachusetts Executive Office of Environmental Affairs. I have been so employed since April 1979.

2. My responsibilities include review of Environmental Notification Forms ("ENF") submitted pursuant to the Massachusetts Environmental Policy Act, G.L. c. 30, ss. 61-62H. Upon receipt of an ENF, I prepare a draft decision for review by the MEPA Director, and signature by the Secretary of the Executive Office of Environmental

Affairs, (the "Secretary") whether an Environmental Impact Report ("EIR") is required, and if so the scope of that EIR. Once an EIR is received, I also help the Secretary determine whether that EIR complies with the requirements of MEPA.

3. I have reviewed the file containing the ENF submitted by the BREACH group which includes Joan Wilson, Ronald Wilson and Theodore Rolfe in connection with proposals to construct rock revetments on the cost of Chatham, in the vicinity of Andrew Hardings Lane, which project was assigned EOEA number 7345.

4. On March 9, 1988 Emergency Status was granted to this project. (Exhibit 1).

5. A request for emergency status was made by Gary Clayton, then director of the Division of Wetlands and Waterways, at DEP on March 8, 1988. A subsequent request for emergency status was made by Robert Weaver of Engineering Information Technology, Inc. on behalf of the BREACH group, and was received by the MEPA Office on March 14, 1988. (Exhibit 2).

6. On September 14, 1988, the above described ENF (#7345), was filed with the MEPA Office, (Exhibit 3).

7. On September 27, 1988, notice of the filing of said ENF was published in the Environmental Monitor.

8. On October 27, 1988, the Secretary of the Executive Office of Environmental Affairs issued a Certificate requiring that an (Environmental Impact Report, ("EIR") be prepared for this project, and identifying the scope of issues to be addressed in the EIR, (Exhibit 4).

9. On January 28, 1993, a draft Environmental Impact Report, ("DEIR") was filed with the MEPA Unit, under cover of a letter from John S. Ramsey of Aubrey Consulting, Inc., to Susan Tierney, Secretary of EOEA dated January 26, 1993, (Exhibit 5).

10. On March 18, 1993, the Secretary issued a certificate stating that the DEIR complied with the provisions of MEPA and regulations promulgated thereunder at 310 CMR 11.00 et seq., as required by 301 CMR 11.08 (3), (Exhibit 6).

11. On August 13, 1993 a Final Environmental Impact Report, (FEIR) was filed with the MEPA Office under cover of a letter from Leslie Fields of Aubrey Consulting, Inc. to the Secretary of EOEA dated August 12, 1993. (Exhibit 7).

12. On August 24, 1993 the Secretary published notice of the availability of the FEIR in the Environmental Monitor, pursuant to 301 CMR 11.09 (3) and 11.19.

13. On September 30, 1993 the Secretary issued a Certificate pursuant to 301 CMR 11.09 (4), (Exhibit 8), stating that the FEIR properly and adequately complied with the provisions of MEPA and the regulations promulgated thereunder at 301 CMR 11.00 et seq.

Signed under the pains and penalties of perjury this 22nd day of August, 1994.

/s/ David Shepardson
David Shepardson

10.28: Coastal Dunes

(1) *Preamble.* All coastal dunes are likely to be significant to storm damage prevention and flood control, and all coastal dunes on barrier beaches and the coastal dune closest to the coastal beach in any area are per se significant to storm damage prevention and flood control. Coastal dunes are also often significant to the protection of wildlife habitat.

Coastal dunes aid in storm damage prevention and flood control by supplying sand to coastal beaches. Coastal dunes aid in storm damage prevented and flood control by supplying sand to coastal beaches. Coastal dunes protect inland coastal areas from storm damage and flooding by storm waves and storm elevated sea levels because such dunes are higher than the coastal beaches which they border. In order to protect this function, coastal dunes volume must be maintained while allowing the coastal dune shape to conform to natural wind and water flow patterns.

Vegetation cover contributes to the growth and stability of coastal dunes by providing conditions favorable to sand deposition.

On retreating shorelines, the ability of the coastal dunes bordering the coastal beach to move landward at the rate of shoreline retreat allows these dunes to maintain their form and volume, which in turn promotes their function of protecting against storm damage or flooding.

A number of birds, most commonly terns and gulls, nest at the base or sides of dunes. In some dune systems other birds also nest in the interdunal area, the species being determined by

the plant community structure, topography, and hydrologic regime of the area. In a few dune systems, wet meadows or vernal pool habitats occur, which serve as important feeding areas for a wide variety of bird species.

When a proposed project involved the dredging, filling, removal or alteration of a coastal dune, the issuing authority shall presume that the area is significant to the interests of storm damage prevention, flood control and the protection of wildlife habitat. This presumption may be overcome only upon a clear showing that a coastal dune does not play a role in storm damage prevention, flood control or the protection of wildlife habitat, and if the issuing authority makes a written determination to that effect.

When a coastal dune is significant to storm damage prevention, flood control or the protection of wildlife habitat, the following characteristics are critical to the protection of those interest(s):

(a) the ability of the dune to erode in response to coastal beach conditions:
(b) dune volume:
(c) dune form, which must be allowed to be changed by wind and natural water flow:
(d) vegetative cover:
(e) the ability of the dune to move landward or laterally; or
(f) the ability of the dune to continue serving as bird nesting habitat.

(2) *Definition.* Coastal Dune means any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune also means sediment

deposited by artificial means and serving the purpose of storm damage prevention or flood control.

WHEN A COASTAL DUNE IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION, FLOOD CONTROL OR THE PROTECTION OF WILDLIFE HABITAT, THE FOLLOWING REGULATIONS SHALL APPLY:

(3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:

(a) affecting the ability of waves to remove sand from the dune:
(b) disturbing the vegetative cover so as to destabilize the dune:
(c) causing any modification of the dune form that would increase the potential for storm or flood damage:
(d) interfering with the landward or lateral movement of the dune:
(e) causing removal of sand from the dune artificially; or
(f) interfering with mapped or otherwise identified bird nesting habitat.

(4) Notwithstanding the provisions of 310 CMR 10.28(3), when a building already exists upon a coastal dune, a project accessory to the existing building may be permitted, provided that such work, using the best commercially available measures, minimizes the adverse effect on the coastal dune caused by the impacts listed in 310 CMR 10.28(3)(b) through 10.28(3)(e). Such an accessory project may include, but is not limited to, a small shed or a small parking area

for residences. It shall not include coastal engineering structures.

(5) The following projects may be permitted, provided that they adhere to the provisions of 310 CMR 10.28(3):

(a) pedestrian walkways, designed to minimize the disturbance to the vegetative cover and traditional bird nesting habitat:
(b) fencing and other devices designed to increase dune development; and
(c) plantings compatible with the natural vegetative cover.

(6) Notwithstanding the provisions of 310 CMR 10.28(3) through (5), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.29: Barrier Beaches

(1) *Preamble.* Barrier beaches are significant to storm damage prevention and flood control and are likely to be significant to the protection of marine fisheries and wildlife habitat and, where there are shellfish, the protection of land containing shellfish.*

Barrier beaches protect landward areas because they provide a buffer to storm waves and to sea levels elevated by storms. Barrier beaches protect from wave action such highly productive wetlands as salt marshes, estuaries, lagoons, salt ponds and fresh water marshes

* For regulations concerning land containing shellfish see 310 CMR 10.34.

and ponds, which are in turn important to marine fisheries and protection of wildlife habitat. Barrier beaches and the dunes thereon are also important to the protection of wildlife habitat in the ways described in 310 CMR 10.27(1) (coastal beaches) and 10.28(1) (coastal dunes).

Barrier beaches are maintained by the alongshore movement of beach sediment caused by wave action. The coastal dunes and tidal flats on a barrier beach consist of sediment supplied by wind action, storm wave overwash and tidal inlet deposition. Barrier beaches in Massachusetts, undergo a landward migration caused by the landward movement of sediment by wind, storm wave overwash and tidal current processes. The continuation of these processes maintains the volume of the landform which is necessary to carry out the storm and flood buffer function.

When a proposed project involves removal, filling, dredging or altering of a barrier beach, the issuing authority shall presume that the barrier beach, including all of its coastal dunes, is significant to the interest(s) specified above. This presumption may be overcome only upon a clear showing that a barrier beach, including all of its coastal dunes, does not play a role in storm damage prevention, flood control, or the protection of marine fisheries, wildlife habitat, or land containing shellfish, and if the issuing authority makes a written determination to such effect.

When a barrier beach is significant to storm damage prevention and flood control, the characteristics of coastal beaches, tidal flats and coastal dunes listed in 310 CMR 10.27(1) and

10.28(1) and their ability to respond to wave action, including storm overwash sediment transport, are critical to the protection of the interests specified above.

(2) *Definition.* Barrier Beach means a narrow low-lying strip of land generally consisting of coastal beaches and coastal dunes extending roughly parallel to the trend of the coast. It is separated from the mainland by a narrow body of fresh, brackish or saline water or a marsh system. A barrier beach may be joined to the mainland at one or both ends.

(3) *When a Barrier Beach is Determined to be Significant to Storm Damage Prevention, Flood Control, Marine Fisheries or Protection of Wildlife Habitat,* 310 CMR 10.27(3) through 10.27(6) (coastal beaches) and 10.28(3) through 10.28(5) (coastal dunes) shall apply to the coastal beaches and to all coastal dunes which make up a barrier beach.

(4) Notwithstanding the provisions of 310 CMR 10.29(3), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.30: Coastal Banks

(1) *Preamble.* Coastal banks are likely to be significant to storm damage prevention and flood control. Coastal banks that supply sediment to coastal beaches, coastal dunes and barrier beaches are per se significant to storm damage prevention and flood control. Coastal banks that, because of their height, provide a buffer to

upland areas from storm waters are significant to storm damage prevention and flood control.

Coastal banks composed of unconsolidated sediment and exposed to vigorous wave action serve as a major continuous source of sediment for beaches, dunes, and barrier beaches (as well as other land forms caused by coastal processes). The supply of sediment is removed from banks by wave action, and this removal takes place in response to beach and sea conditions. It is a naturally occurring process necessary to the continued existence of coastal beaches, coastal dunes and barrier beaches which, in turn, dissipate storm wave energy, thus protecting structures of coastal wetlands landward of them from storm damage and flooding.

Coastal banks, because of their height and stability, may act as a buffer or natural wall, which protects upland areas from storm damage and flooding. While erosion caused by wave action is an integral part of shoreline processes and furnishes important sediment to downdrift landforms, erosion of a coastal bank by wind and rain runoff, which plays only a minor role in beach nourishment, should not be increased unnecessarily. Therefore, disturbances to a coastal bank which reduce its natural resistance to wind and rain erosion cause cuts and gullys in the bank, increases the risk of its collapse, increase the danger to structures at the top of the bank and decrease its value as a buffer.

Bank vegetation tends to stabilize the bank and reduce the rate of erosion due to wind and rain runoff. Pedestrian and vehicular traffic

damages the protective vegetation and frequently leads to gully erosion or deep "blowouts" on unconsolidated banks. Therefore, any project permitted by 310 CMR 10.30 should incorporate, when appropriate, elevated walkways.

A particular coastal bank may serve both as a sediment source and as a buffer, or it may serve only one role.

When a proposed project involves dredging, removing, filling, or altering a coastal bank, the issuing authority shall presume that the area is significant to storm damage prevention and flood control. This presumption may be overcome only upon a clear showing that a coastal bank does not play a role in storm damage prevention or flood control, and if the issuing authority makes a written determination to that effect.

When issuing authority determines that a coastal bank is significant to storm damage prevention or flood control because it supplies sediment to coastal beaches, coastal dunes or barrier beaches, the ability of the coastal bank to erode in response to wave action is critical to the protection of that interest(s).

When the issuing authority determines that a coastal bank is significant to storm damage prevention or flood control because it is a vertical buffer to storm waters, the stability of the bank, i.e., the natural resistance of the bank to erosion caused by wind and rain runoff, is critical to the protection of that interest(s).

(2) *Definition.* Coastal Bank means the seaward face or side of any elevated landform, other than

a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland.

WHEN A COASTAL BANK IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION OR FLOOD CONTROL BECAUSE IT SUPPLIES SEDIMENT TO COASTAL BEACHES, COASTAL DUNES OR BARRIER BEACHES, THE FOLLOWING REGULATIONS SHALL APPLY:

(3) No new bulkhead, revetment, seawall, groin or other coastal engineering structure shall be permitted on such a coastal bank except that such a coastal engineering structure shall be permitted when required to prevent storm damage to buildings constructed prior to the effective date of these regulations or constructed pursuant to a Notice of Intent filed prior to the effective date of these regulations (August 10, 1978), including reconstructions of such buildings subsequent to the effective date of these regulations, provided that the following requirements are met:

(a) a coastal engineering structure or a modification thereto shall be designed and constructed so as to minimize, using best available measures, adverse effects on adjacent or nearby coastal beaches due to changes in wave action, and

(b) the applicant demonstrates that no method of protecting the building other than the proposed coastal engineering structure is feasible.

(c) protective planting designed to reduce erosion may be permitted.

(4) any project on a coastal bank or within 100 feet landward of the top of a coastal bank, other than a structure permitted by 310 CMR 10.30(3), shall not have an adverse effect due to wave action on the movement of sediment from the coastal bank to coastal beaches or land subject to tidal action.

(5) The Order of conditions and Certificate of Compliance for any new building within 100 feet landward of the top of a coastal bank permitted by the issuing authority under this Act shall contain the specific condition: 310 CMR 10.30(3) of the Wetlands Regulations, promulgated under M.G.L. c. 131. s. 40, requires that no coastal engineering structure, such as a bulkhead, revetment, or seawall shall be permitted on an eroding bank at any time in the future to protect the project allowed by this Order of Conditions.

WHEN A COASTAL BANK IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION OR FLOOD CONTROL BECAUSE IT IS A VERTICAL BUFFER TO STORM WATERS, THE FOLLOWING REGULATIONS SHALL APPLY:

(6) Any project on such a coastal bank or within 100 feet landward of the top of such coastal bank shall have no adverse effects on the stability of the coastal bank.

(7) Bulkheads, revetments, seawalls, groins or other coastal engineering structures may be permitted on such a coastal bank except when such bank is significant to storm damage prevention or flood control because it supplies sediment to coastal beaches, coastal dunes, and barrier beaches.

(8) Notwithstanding the provisions of 310 CMR 10.30(3) through (7), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
100 Cambridge Street, Boston, 02202

[LOGO]
WILLIAM F. WELD
GOVERNOR
ARGEO PAUL CELLUCCI
Lieutenant Governor
TRUDY COXE
SECRETARY

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September 30, 1993

CERTIFICATE OF THE SECRETARY
OF ENVIRONMENTAL AFFAIRS ON
THE FINAL ENVIRONMENTAL IMPACT REPORT

PROJECT NAME	:	Breach Project, Phase I
PROJECT LOCATION	:	Chatham
EOEA NUMBER	:	7345
PROJECT PROPONENT	:	Chatham Coastal Erosion
DATE NOTICED IN MONITOR	:	Advisory Comm. August 24, 1993

The Secretary of Environmental Affairs herein issues a statement that the Final Environmental Impact Report submitted on the above project adequately and properly complies with the Massachusetts Environmental Policy Act (G. L., c. 30, s. 61-62H) and with its implementing regulations (301 CMR 11.00).

The breach project is an attempt to protect developed areas in Chatham from the damaging wave climate resulting from the 1987 breach of the Nauset Barrier Beach. The project has been divided into two phases for purposes of environmental impact review. The phase I EIR addresses

the issues of revetment construction on properties from Aunt Lydia's Cove to the Beach and Tennis Club. A future Phase II EIR will address the environmental issues resulting from efforts to protect properties south of the Beach and Tennis Club to Morris Island. The Phase II area consists of dune fields whereas most of Phase I involves construction of protective structures on coastal banks.

The majority of property owners in the Phase I area have constructed some protective structures under emergency authorizations of this office and DEP. Thus, the focus of the Phase I EIR has been to identify any impacts that have been caused by the structures and to propose mitigation for those impacts. Following the appeal period for this decision, state agencies can issue normal (i.e., non-emergency) permits properly conditioned to minimize the potential impacts documented in the EIR.

The FEIR has also evaluated the environmental impacts of additional efforts which may be necessary to assure the integrity of the coastal revetments and the environmental impacts of enhancing the dunes on two unarmored segments.

The FEIR has expanded and clarified the mitigation commitments of the proponents. Comments have been received that question the ability to ensure that public access will be provided for as mitigation for the beach nourishment to be undertaken by the Town. I request that the permitting agencies require mitigation commitments in the form of public access easements prior to issuance of the state approvals.

Another concern in the longterm loss of public access to the intertidal area. The FEIR proposes that the trigger

point for beach nourishment be the movement of the breach to a point opposite the marina. If that is an appropriate distance to be nourishing the beach at the Beach and Tennis Club, it would appear desirable to begin the nourishment of northern areas when a comparable distance becomes available. Since nourishment sand is available on a frequent basis, the total renourishment can be spread over a number of dredging contracts over a number of years, and some of the beach and intertidal areas could be restored in less than 20 to 40 years. Even if some of the nourishment sand is lost to erosion during the project, adequate replacement material is probably available from dredging projects which otherwise must find a disposal site for each dredging effort.

I assume that the dune enhancement will be on-going so as to counteract coastal erosion and maintain adequate storm damage protection.

The conclusions of this FEIR are valid for the next 5 years, and probably longer if a continuing project ensues. If proposals are developed for activities which were not evaluated in this EIR, proponents must submit a notice of project change to my office. Proposals to add further protection already evaluated in the EIR must be submitted only to the permitting agencies. The agencies can act based on the Section 61 Findings prepared in connection with this EIR.

The EIR is also serving as a report of a project of regional significance for the Cape Cod Commission. As such I understand that a hearing will be held shortly to complete the review by the Commission.

September 30, 1993
Date

/s/ Trudy Coxe
Trudy Coxe, Secretary

Comments received : CCC - 9/23/93
MCZM - 9/24/93
N Soutter - 9/21/93

TC/DES/ds

11.20: Legal Challenges

(1) *Notice of Action.* An agency or person intending to commence an action or proceeding alleging an improper determination of whether a project requires the preparation of an EIR under 301 CMR 11.06, or improper determination on a notice of project change under 301 CMR 11.17, shall first provide notice of intention to commence such action or proceeding on the form provided in 301 CMR 11.29(2) within sixty days of publication in the Environmental Monitor of notice of such determination. An agency or person intending to commence an action or proceeding alleging that a final EIR fails to comply with the requirements of MEPA, shall first provide notice of intention to commence such action or proceeding on the form provided in 301 CMR 11.29(3) within sixty days of publication in the Environmental Monitor of notice of availability of said Final EIR. Said notices of intention shall include the EOEA file number and shall identify with particularity the issues and reasons why it is believed compliance is inadequate. Such notices of intention shall be in lieu of the notice and waiting period required by M.G.L. c. 214, s. 7A, and shall be provided to the Attorney General, the proponent, and the Secretary.

(2) *Commencement of Action.* Any action or proceeding alleging an improper determination of whether a project requires the preparation of an EIR shall commence no later than thirty days following the first issuance of a permit or grant of financial assistance by an agency or no later than sixty days after issuance of notice of such

determination, whichever occurs later, for a private project, or no later than one hundred and twenty days after issuance of notice of such determination for a public project. Any action or proceeding alleging that a Final EIR fails to comply with the provisions of MEPA shall commence no later than thirty days following the first issuance of a permit or grant of financial assistance by an agency for a private project or no later than one hundred and twenty days after issuance of notice of availability of said Final EIR under 301 CMR 11.09 for a public project.

(3) No allegation shall be made in any action or proceeding under MEPA unless the matter complained of was raised at the appropriate point in the administrative review procedures established in these regulations, provided that a matter may be raised upon a showing that is material and that it was not reasonably possible with due diligence to have raised it during such procedures or that the matter sought to be raised is of critical importance to the environmental impact of the project.

(4) If a court determines that an agency or person has knowingly concealed a material fact or knowingly submitted false information, limits on the manner and time in which actions or proceedings may be commenced shall not apply and the Secretary may require the repetition of any or all of the steps in the MEPA process.

EXCERPTS

Massachusetts General Laws, Chapter 30

Section 62B: Environmental impact Reports; Preparation and submission; Funding

G.L.c. 30, sec. 62B states:

An environmental impact report *shall* contain statements describing the nature and extent of the proposed project and its environmental impact; all measures being utilized to minimize environmental damage; any adverse short-term and long-term environmental consequences which cannot be avoided should the project be undertaken; and reasonable alternatives to the proposed projects and their environmental consequences. (emphasis added)

301 Code of Massachusetts Regulations

Section 11.07: Outline and contenct [sic] of the EIR

Section 11.07(4): Alternatives to the Proposed Project

301 CMR 11.07(4) requires that EIRs:

. . . include a description of each alternative to the proposed project and a discussion of the primary differences among alternatives, particularly as they may affect the environment . . . [also] In all EIRs, the alternative of not carrying out the project (the No Build alternative) *shall* be addressed to establish the future baseline conditions to which the effects of the project will be compared. (emphasis added)

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 95-P-565

JOAN WILSON, et al.,
Plaintiffs-Appellants

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant-Appellee

BRIEF OF PLAINTIFFS – APPELLANTS

On Appeal from an Order of Dismissal of the Superior Court Department of the Trial Court in and for Barnstable County

---

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* * *

I. TABLE OF CASES, CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATISES

CASES

Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) 41

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Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886 (1992) 2, 41, 42

* * *

The environmental impact of a project and alternatives to it must be discussed in an EIR [860 and G.L.c. 30, sec. 62H].

Had plaintiffs paid for the EIR and waited the year needed for its completion, they would have wasted $136,000.

3) *ENF Was Postponed*

a) by defendant –

The trial court concluded that on March 8, 1988 "the Department gave *other* landowners [excluding plaintiffs] emergency authorization to begin building stone revetments, without first filing an ENF" [910 (footnote)] (emphasis and insertion added).

David Shepardson, defendant's MEPA officer, told the Court that the waiver applied to *plaintiffs* and others [402].

The waiver was discussed in the Opposition to Summary Judgment [115] and proper reference made to the full text in the appendix [171].

b) plaintiffs tried to file –

The Trial Court could not find evidence that plaintiffs filed or tried to file an ENF in March of 1988 [footnote 910].

Evidence as to filing the ENF was properly referenced in Plaintiffs' Opposition [115] as Exhibit 8 [179].

c) precondition for superseding order –

Absent an ENF or ENF waiver, defendant must deny a project specifically for failure to file an ENF (310 CMR 10.07(1) and (2)) [1005].

Defendant's Order of March 4, 1988 did not mention an ENF and denied plaintiffs' seawalls because they would be on dune [161 and 166].

* * *